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HAR RRARY

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WASHINGTON REPORTS

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IN THE

SUPREME COURT

OF

WASHINGTON

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OF THE

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ERRATA

Page 6, line 1: for interferred read interfered

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CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON.

[No. 5973. Decided February 26, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. BURT MCFADDEN, *Appellant*.[1]

CRIMINAL LAW—ASSAULT—THREATS. A person may be guilty of assault and battery where he advances toward another threatening to "put him out of his misery," and at the same time deliberately drawing a revolver from his pocket which is taken from him by the bystanders after some considerable effort; and the question of his guilt or innocence is one for the jury.

CRIMINAL LAW—INFORMATION—LOSS AND SUBSTITUTION—COSTS. Where an information is lost, the substitution of a new information at the trial, which is given a new case number, is not an institution of a new prosecution, and it is not error to tax against the defendant the costs of the original proceeding.

CRIMINAL LAW — ASSAULT — EVIDENCE — ADMISSIBILITY. Upon a prosecution for an assault made by advancing upon the prosecuting witness and drawing a revolver, evidence that the defendant on the day after the occurrence stated that he "mighty near killed" the prosecuting witness, is admissible upon the issue as to whether the violence was only menaced or was actually begun.

Appeal from a judgment of the superior court for Kittitas county, Rigg, J., entered May 29, 1905, upon a trial and conviction of assault. Affirmed.

Pruyn & Slemmons, for appellant, to the point that drawing a pistol without presenting or using it, is not an assault,

[1]Reported in 84 Pac. 401.

cited: *Lawson v. State,* 30 Ala. 14; *Mulligan v. People,* 5 Park C. C. (N. Y.) 105; *State v. Baker,* 20 R. I. 275, 38 Atl. 653, 78 Am. St. 863; 1 McClain, Criminal Law, p. 199, § 232; *People v. Dodel,* 77 Cal. 293, 19 Pac. 484. And so the act of picking up a stone with the intention of throwing it to injure another, is not assault. 1 McClain, Criminal Law, § 225; *Brown v. State,* 95 Ga. 481, 20 S. E. 495.

Austin Mires, for respondent, contended, that a clear intent to commit violence, accompanied by acts which if not interrupted will be followed by personal injury, constitutes an assault. Bishop, Criminal Law (7th ed.), pp. 14, 15; *People v. Yslas,* 27 Cal. 631; 1 McClain, Criminal Law, pp. 199, 200; *Johnson v. State,* 35 Ala. 363, 365; *State v. Davis,* 1 Ired. (N. C.) 125, 35 Am. Dec. 735; *People v. McMakin,* 8 Cal. 547.

FULLERTON, J.—The appellant was informed against for the crime of assault with a deadly weapon with intent to inflict upon the person of another a bodily injury. On the trial the jury found him guilty of a simple assault, and from the judgment entered against him thereon he appeals.

The first contention made by the appellant is that the evidence is insufficient to sustain the verdict; the precise contention being that the facts shown do not constitute an assault. From the record it appears that, on the day named in the information, the prosecuting witness and the appellant met on the streets in the city of Ellensburg, and engaged in a personal altercation, to stop which the city marshall took the prosecuting witness into custody. The appellant thereupon went to the place where his belongings were placed, and procured a revolver and announced his intention to shoot the prosecuting witness. He then proceeded to the place where the prosecuting witness had been taken by the marshall, and, on seeing him, made an exclamation to the effect that he would put him out of his misery, and at the same time advanced towards him proceeding to draw the re-

volver from the pocket in which he carried it. At this point he was interrupted by the by-standers, and his revolver taken from him, after some considerable effort. These, in brief, are the acts shown by the state, and it seems to us that they plainly constitute an assault.

An assault is defined by the code to be an attempt in a rude, insolent and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution. While it is true that under this definition of an assault, as under the common law definition of that offense, there must be some physical effort to carry into execution the violence menaced before it can be said an assault has been committed, it is also true that the question does not depend upon the degree of effort put forth, nor upon how far the defendant had gone towards the accomplishment of his purpose. The line between violence menaced, and violence actually begun may be a narrow one, yet when it is apparent that the defendant's acts if not stopped or diverted will lead to the corporal hurt of another, the execution of the purpose has begun, and there is a sufficient attempt to satisfy the definition of the statute. Here it seems to us clear that the acts of the defendant had proceeded beyond mere menaces. He not only made threats of violence, but he advanced towards the person threatened, proceeded to draw his revolver, and ceased only from his design when compelled to cease by the interference of third persons. This was at least an apparent attempt to carry into execution the violence menaced; and the question of the defendant's guilt or innocence was properly submitted to the jury.

When the case was called for trial, it was discovered that the information was missing. After search it was believed to be irretrievably lost, whereupon the court permitted another information to be filed in the place of the missing one. This last information was given a new case number by the clerk of the court, the defendant was required to plead anew thereto, and the case proceeded as if a new proceeding

had been instituted. The appellant now insists that it was the institution of a new proceeding against him, and that the court erred in taxing against him the cost of the original proceeding, and the costs of the preliminary examination on which the first information was based. But we think the appellant is mistaken in asserting that the filing of the second information was the institution of a new proceeding. This was in effect a mere continuation of the original case. If in any stage of a criminal proceeding the indictment or information becomes lost or destroyed the court has power to direct a substitution. The substituted indictment or information should be a correct copy of the original if possible, but if the data on hand is not sufficient from which to make an exact copy, a copy as near as may be is sufficient. To substitute was in effect what was done in this case. While the court took the precaution to require the defendant to plead over, this was unnecessary. It would have been proper for the court to have ordered the substitution made and directed the case to continue as if on the original information. But since the procedure followed had this effect it was not error to tax the costs of the entire proceeding to the defendant as part of the judgment imposed upon him.

The court permitted the state to show that the appellant had stated, when speaking of the alleged assault, on the next day after its occurrence, that "he mighty near killed George Simpson" (Simpson being the prosecuting witness). It was objected to this in the court below that it was immaterial and did not tend to prove any of the issues in the case, and this contention is made in this court. The statement was properly admitted. One of the issues in the case was whether the acts of the appellant was violence only menaced, or violence actually begun, and to determine this the purpose of the appellant at the time the alleged assault was made was a material inquiry. This evidence tended to show the appellant's purpose at that time, and was admissible for that reason.

The instructions of the court were fair, and we find no error in any of the matters complained of in the assignments pertaining to them. The judgment is affirmed.

MOUNT, C. J., HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5916. Decided February 26, 1906.]

CLAUDE C. COLVIN, *Appellant,* v. NORTHERN PACIFIC RAILWAY COMPANY, *Respondent.*[1]

APPEAL—REVIEW—GRANT OF NEW TRIAL. Where a motion was made for a new trial upon several grounds, it not appearing upon which of them the ruling of the court was based, the action of the court in granting a new trial should not be disturbed on appeal if it can be sustained, or was within the discretion of the court, upon any of the grounds stated.

Appeal from an order of the superior court for King county, Morris, J., entered July 3, 1905, granting a new trial, after a trial on the merits and the verdict of a jury rendered in favor of the plaintiff in an action to recover damages for ejection from a train. Affirmed.

Rossman & Johnson, for appellant.

Carroll B. Graves, for respondent. An order granting or refusing a new trial will not be disturbed where there is a substantial conflict in the testimony. *Rotting v. Cleman,* 12 Wash. 615, 41 Pac. 907; *McBroom & Wilson Co. v. Gandy* 18 Wash. 79, 50 Pac. 572; *State v. Symes,* 17 Wash. 596, 50 Pac. 487; *Friedman v. Manley,* 21 Wash. 43, 56 Pac. 832; *Bender v. Rinker,* 21 Wash. 636, 59 Pac. 504; *Hughes v. Dexter Horton Co.,* 26 Wash. 110, 66 Pac. 109; *Welever v. Advance Shingle Co.,* 34 Wash. 331, 75 Pac. 863; *Brennan v. Seattle,* 39 Wash. 640, 81 Pac. 1092. It is within the

[1]Reported in 84 Pac. 616.

discretion of the court, and will not be interferred with in the absence of abuse. *Rinehart v. Watson,* 11 Wash. 526, 40 Pac. 127; *Bracka v. Fish,* 28 Wash. 410, 68 Pac. 872; *Corbitt v. Harrington,* 14 Wash. 197, 44 Pac. 132; *Trumbull v. Jackman,* 9 Wash. 524, 37 Pac. 680; *O'Rourke v. Jones,* 22 Wash. 629, 61 Pac. 709; *Latimer v. Black,* 24 Wash. 231, 64 Pac. 176; *Holgate v. Parker,* 18 Wash. 206, 51 Pac. 368. If there is any theory upon which it can be reasonably sustained, the order should be affirmed. *Trumbull v. Jackman, supra.* The evidence did not support the allegations of the complaint. *Redford v. Spokane St. R. Co.,* 9 Wash. 55, 36 Pac. 1085; *Albin v. Seattle Electric Co.,* 40 Wash. 51, 82 Pac. 145.

DUNBAR, J.—This acton was brought by the appellant to recover from the respondent $1,950, damages for injuries alleged to have been sustained by appellant in consequence of the careless, negligent, wanton, and wrongful acts of the respondent, its agents, servants, and employees, in throwing off appellant from one of its passenger trains. The jury returned a verdict for $675, in favor of the appellant, and upon motion of the respondent, a new trial was granted by the court. From the order of the court granting a new trial, this appeal is prosecuted.

There is no particular assignment of error made by the appellant in his brief, but it can be gathered from the whole tenor of the brief that the contention is that the court erred in granting a new trial, for the reason that the evidence was not sufficient to sustain the verdict which he had received at the hands of the jury. This judgment must be affirmed for two reasons. In the first place, it does not appear from the record brought here by the appellant upon what ground the motion for a new trial was granted. The motion stated the ordinary statutory grounds. The order granting the new trial was a general order. All intendments are in favor of the judgment, and there is nothing to indicate whether

the motion was granted for the reason that the weight of evidence was against the verdict, or for irregularity in the proceedings of the court and of the jury by which the defendant was prevented from having a fair trial, because there was newly discovered evidence material for the defendant which it did not and could not with reasonable dilgence have discovered and produced at the trial, or on account of excessive damages appearing to have been given under the influence of passion and prejudice, all of which were incorporated in the motion, or for other errors in law occurring at the trial and excepted to at the time by the defendant, which was also another ground of the motion. If the judgment can be sustained on any ground, it will not be reversed; and before a judgment is reversed, it must affirmatively appear that error was committed. That error was committed does not affirmatively appear by the record in this case. It was said by this court, in *Trumbull v. Jackman,* 9 Wash. 524, 37 Pac. 680, that if there is any theory upon which the action of the lower court can be reasonably sustained, the order should be affirmed. And this question was passed upon directly by this court in *Bender v. Rinker,* 21 Wash. 636, 59 Pac. 504, where it was held that the action of the superior court in granting a new trial would not be reviewed on appeal, when the record did not disclose the grounds upon which the action of the court was based. In that case it was said:

"Under the circumstances, we are unable to determine upon which ground of the motion the new trial was granted. If it was because of the alleged insufficiency of the evidence to justify the verdict, that was a matter within the discretion of the lower court, who heard and saw the witnesses; and the conclusion reached thereon would not be disturbed by this court, excepting for an abuse of discretion, and where, as here, the evidence at the trial is conflicting this court will not disturb the conclusion of the trial court upon such a motion. On the other hand, if it was for alleged errors of law occurring at the trial and it could be ascertained from the record

that such were the reasons for awarding the new trial, an appeal from such an order would present a clear-cut legal question, and a ruling of the lower court in such a case would not involve the exercise of any discreton, and this court would unhesitatingly review it."

In that case, as in this, the motion for a new trial was based upon the ordinary statutory grounds, and the order was in general terms, not specifying any particular ground upon which the new trial was awarded. But, even if the appellant's contention were true, that the new trial was granted upon a theory that the evidence did not sustain the verdict, still under the uniform rulings of this court, the judgment would not be disturbed, unless it appeared that the discretion vested in the court by the statute had been abused.

Subdivision 7 of § 5071, Bal. Code, provides that a new trial may be granted on motion of the party aggrieved on account of the insufficiency of the evidence to justify the verdict or other decision. Force was given to this statute by this court in *Rinehart v. Watson,* 11 Wash. 526, 40 Pac. 127, where it was held that the granting of a new trial, being a matter addressed to the discretion of the lower court, its action therein will not be disturbed when there is no showing of an abuse of discretion. This case was followed in *Rotting v. Cleman,* 12 Wash. 615, 41 Pac. 907, where it was held that where the record shows that the motion for a new trial was made on several grounds, but does not show upon which of them the ruling of the court was based, the order of the court will be reversed if it was within the sound discretion of the court to make it upon any of the grounds stated. In that case it was said:

"In this case it was within the discretion of the court to grant a new trial upon the ground of insufficiency of the evidence to justify the verdict. While it is the duty of the trial court to grant a new trial when it appears to the court that the verdict is manifestly against the weight of the evidence and the justice of the case, the rule is different in appellate courts. On appeal the orders of the trial court, in granting

or refusing new trials will not be disturbed where the record shows a substantial conflict in the testimony;"

citing Hayne, New Trial and Appeal, § 228, where that author says:

"Where there is a substantial conflict in the evidence the supreme court will not disturb the decision of the court below. This rule has been announced more frequently than any other rule of practice. It applies equally where the court below granted as where it denied the motion for new trial."

To the same effect are, *Corbitt v. Harrington,* 14 Wash. 197, 44 Pac. 132; *State v. Symes,* 17 Wash. 596, 50 Pac. 487; *McBroom & Wilson Co. v. Gandy,* 18 Wash. 79, 50 Pac. 572; *Holgate v. Parker,* 18 Wash. 206, 51 Pac. 368; *Friedman v. Manley,* 21 Wash. 43, 56 Pac. 832.

In *O'Rourke v. Jones,* 22 Wash. 629, 61 Pac. 709, we held that the action of the trial court in granting a new trial was not an abuse of the discretion conferred on the court in such matters, when there was a substantial conflict in the evidence submitted to the jury. To the same effect are *Bracka v. Fish,* 28 Wash. 410, 68 Pac. 872; *Latimer v. Black,* 24 Wash. 231, 64 Pac. 176; *Welever v. Advance Shingle Co.,* 34 Wash. 331, 75 Pac. 863; *Brennan v. Seattle,* 39 Wash. 640, 81 Pac. 1092. In fact, the ruling on this question has been uniform and frequent.

An inspection of the record showing that the evidence was conflicting, and it not appearing therefrom that the court abused its discretion in granting a new trial, the judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, CROW, and ROOT, JJ., concur.

[No. 5964. Decided February 26, 1906.]

JAMES MORGAN, *Respondent*, v. THE NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY, *Appellant*.[1]

LIFE INSURANCE — POLICY — WAIVER — ACCEPTANCE OF OVERDUE PREMIUMS. A life insurance company waives the provisions of the policy requiring monthly payments of a premium to be made in advance, by continually accepting payments any time within the month, without question or objection, and this course of conduct was such as to mislead a person of ordinary prudence.

Appeal from a judgment of the superior court for Walla Walla county, Brents J., entered March 8, 1905, upon the verdict of a jury in favor of the plaintiff in an action upon a policy of life insurance. Affirmed.

W. F. Crowe and *R. J. Burglehaus*, for appellant, contended, *inter alia*, that failure to make payment of the premium involved a forfeiture, and there was no waiver since the policy provided that the facts here relied on should not have that effect. *Nixon v. Travelers' Ins. Co.*, 25 Wash. 254, 65 Pac. 195; *Robertson v. Metropolitan Life Ins. Co.*, 88 N. Y. 541; *Conway v. Phoenix Mut. Ins. Co.*, 140 N. Y. 79; *D'Orlu v. Bankers etc. Life Ass'n*, 46 Fed. 355; *Klein v. Insurance Co.*, 104 U. S. 88, 26 L. Ed. 662; *Thompson v. Insurance Co.*, 104 U. S. 252, 26 L. Ed. 765; *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487; *Gaterman v. American Life Ins. Co.*, 1 Mo. App. 300; *Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789. Even in the absence of such stipulation, the facts shown do not establish a waiver. *Smith v. New England etc. Ins. Co.*, 63 Fed. 769; *Hartford Life Ins. Co. v. Unsell*, 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765; *Schmertz v. United States Life Ins. Co.*, 118 Fed. 250; *Behling v. Northwestern Nat. Life Ins. Co.*, 117 Wis. 24, 93 N. W. 800; *Morrow v. Des Moines Ins. Co.*, 84

[1]Reported in 84 Pac. 412.

Iowa 256, 51 N. W. 13; *Union Cent. Life Ins. Co. v. Chowning,* 8 Tex. Civ. App. 455, 28 S. W. 117; *Jones v. National Mut. Ben. Ass'n,* 8 Ky. Law 599, 2 S. W. 447; *Servoss v. Western Mut. Aid Soc.,* 67 Iowa 86, 24 N. W. 604. The holder of a life insurance policy has no equities which entitle him to relief against a forefiture for nonpayment of premium. *Kellner v. Mutual Life Ins. Co.,* 43 Fed. 623.

Sharpstein & Sharpstein, for respondent, to the point that the instruction as to waiver correctly stated the law, cited: *Hartford etc. Ins. Co. v. Unsell,* 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496; *Spoeri v. Massachusetts etc. Ins. Co.,* 39 Fed. 752; *Appleton v. Phoenix etc. Ins. Co.,* 59 N. H. 541, 47 Am. Rep. 220; *Stylow v. Wisconsin etc. Ins. Co.,* 69 Wis. 224, 2 Am. St. 738; 2 Joyce, Insurance; *Thompson v. St. Louis etc. Ins. Co.,* 52 Mo. 469; *Insurance Co. v. Wolff,* 95 U. S. 326, 24 L. Ed. 387; *Cole v. Union Cent. Life Ins. Co.,* 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201. Where, under the undisputed facts, the prevailing party is entitled to recover, the other cannot complain of errors in instructions. *Secor v. Oregon Imp. Co.,* 15 Wash. 35, 45 Pac. 654; *Kellogg v. Cook,* 18 Wash. 516, 52 Pac. 233.

DUNBAR, J.—Action on a life insurance policy. The policy contained the provision that all premiums were payable in advance. It also contained a provision that premiums might be paid to agents producing receipts signed by the president and secretary and countersigned by the agent, and that nonpayment of any premium when due should forfeit the premiums paid on the policy, and terminate the liability of the company therein. It also contained the following provision:

"Notice—That each and every payment of premium is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and further notice is hereby expressly waived. The giving of any other notice of the acceptance of any premium after it is due is

to be considered as an act of courtesy only, and shall not be deemed as establishing a custom or as waiving or disturbing any of the conditions as to payment of premiums thereafter due."

The premiums were payable quarterly, on or before the 1st day of December, March, June, and September in every year. The mode of payment was afterwards changed by the company to monthly payments. At the beginning of the second year, the first monthly installment was paid in advance, but thereafter none of the installments were paid on the 1st day of the month on which they fell due, but were all paid during the month. The last payment was made on 19th day of September in the second year, and the insured died on the 13th day of October, without paying the installment for the month of October. The policy provided for reinstatement during the life of the insured, within twelve months of the date of the lapse, by the payment of all past due premiums and a fine of ten per cent per annum thereon. Upon the death of the policy holder, the company refused to pay the policy, and this action was brought for its collection, and a judgment obtained for the amount alleged to be due on the policy.

The only assignment of error by the appellant is to the following instruction given by the court:

"Now, if you find from the evidence that she made all of the payments of these monthly installments of premium toward the latter part of the month, after the making of the new arrangement, and that the company received them without objection and without calling her attention to the fact that they were payable sooner, and if you further find that, by such course of dealing, she as a prudent person was led to believe, and did believe, that she was making these payments according to the terms of this new arrangement, by making them at any time during the month—if you find that she so understood the new arrangement, and that the custom and conduct of the company in receiving these payments without objection were calculated to lead an ordinarily prudent person to so understand and believe, and that

she was thereby induced to rest in that belief and understanding at all times previous to her death and that, in consequence of such conduct on the part of the company, she had good reason to believe, and did believe, up to that time that she had paid all these installments as they became due, and that the last one was then overdue—if you find all these facts from the evidence in the case, then I instruct you that the company is estopped and has waived its right to insist upon the forfeiture of this policy by reason of the nonpayment of the last installment of premium, and in that case your verdict should be for the plaintiff."

This instruction seems to us to be so fully and completely in accord, not only with the established principles of law, but with the universally accepted principles of good morals, that it is difficult to make an argument in its defense. The rule announced by the court could certainly not be questioned if it were applied to the dealings of individuals with each other, for no individual would be allowed by his attitude, his conduct, and long-continued custom of doing business with another individual, to mislead him to his disadvantage. And, if so, why should not the same rule control insurance companies, where confessedly parties do not stand upon the same level footing as do individuals in making contracts with each other? The instruction was guarded and made to apply only to persons ordinarily prudent, and if such ordinarily prudent person, by the course of conduct of the company, was misled to her disadvantage, the party who misled her cannot claim any advantage from such wrongdoing. As showing the construction that these parties placed upon this contract, it will only be necessary to cite the dates of the payments under the new arrangement, including the nine months preceding the death of the insured. The payments made were as follows:

January 31, 1903....	$10	June 30, 1903.....	$10
February 28, 1903...	$10	July 31, 1903.....	$10
March 27, 1903.....	$10	August 31, 1903.....	$10
April 28, 1903.....	$10	September 19, 1903..	$10
May 29, 1903.....	$10		

So that it will be seen that this woman, under the strict construction of the contract relied upon by the appellant, during all of these nine months in which they were receiving and appropriating $10 a month from her, was actually insured but a very few days. For, during the months of January, February, June, July, and August, she was not insured at all, or at the most but for a few hours in each month, and during the other months, as will be seen, her time of insurance amounted to a very few days. It would be inequitable to allow the company to receive money under such circumstances and disclaim any responsibility to the insured.

These questions of waiver have been before the courts many times and all modern courts, at least, have decided that, under such circumstances as are shown by this case, the condition with reference to payment in advance was waived. Among other courts, the supreme court of the United States has spoken with no uncertain sound. In *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387, in construing a policy of this kind, the court, through Justice Field, among other things, said:

"The principle that no one shall be permitted to deny that he intended the natural consequences of his acts when he has induced others to rely upon them, is as applicable to insurance companies as it is to individuals, and will serve to solve the difficulty mentioned. This principle is one of sound morals as well as of sound law, and its enforcement tends to uphold good faith and fair dealing. If, therefore, the conduct of the company in its dealings with the assured in this case, and with others similarly situated, has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due, would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And if the acts creating such belief were done by the agent and were subsequently approved by

the company, either expressly or by receiving and retaining the premiums, the same consequences should follow."

In that case there was a provision in the policy that the agents were not authorized to waive forfeitures.

In *Thompson v. St. Louis etc. Ins. Co.*, 52 Mo. 469, the following provision appears under the title, "Notice:"

"Agents of this company are not authorized to grant permits or to make, alter or discharge contracts, or waive forfeitures. If a premium is received by the company after the day named in the policy for its payment, it is considered by the company and the assured as an act of grace or courtesy, and forms no precedent in regard to future payments."

Notwithstanding this provision, the court gave the following instruction:

"If the jury believe from the evidence, that it had not been the practice of the defendant to exact prompt payments of premiums when due under the policy sued on; that they had allowed the said payments to lie over for several days or weeks after they became due, and then accepted payment of said premiums, then these are facts from which the jury may find that the defendant waived a literal compliance with the condition as to punctual payment."

This instruction was approved by the supreme court with the following comment on the provision referred to:

"The memorandum at the foot of the policy did not give any additional force to the stipulation in the policy, if we may consider it as having any effect whatever. If it had any force, it seemed to be looked upon by the parties as a license or invitation to the plaintiff to disregard the exact day of payment and to rely upon the courtesy of the company. The plaintiff pursued this course, and instead of making his payments on the very day when due, let them lie over for a short time, and still they were received without objection. The plaintiff was thus induced to believe that a failure of strict payment on the day would not prejudice his rights."

And in conclusion the court said:

"So in regard to the payment of premiums, it seems to be well settled that the practice of the company in accept-

ing the same without objection after the day stipulated for the payment, must be treated as a waiver of the exact time as an essential ingredient of the contract;"

citing *Buckbee v. United States Ins. etc. Co.,* 18 Barb. 541, and *Ruse v. Mutual etc. Ins. Co.,* 26 Barb. 556.

Where an insurance company receives payments on assessments on a policy when they are overdue, and when it might refuse payment and declare the policy forfeited under its by-laws, it cannot accept and keep the money, and still insist upon a forfeiture. *Stylow v. Wisconsin etc. Ins. Co.,* 69 Wis. 224, 2 Am. St. 738.

In discussing this question the court said:

"The assured had every reason to believe that the company would accept the payment of these assessments as it had accepted the payment of all others within a reasonable time after they became due, without making any question as to his state of health. And it is equally plain that, had payment been tendered the day before the death of the insured, such payment would have been accepted. The forfeiture, if any, arose upon the nonpayment on or before the day fixed for payment; and it is clear, from the evidence, that the company did not consider it forfeited on that day, and it cannot afterwards declare it forfeited because of the happening of an event which has nothing to do with the payment of the sum due."

It is equally clear here that the company did not consider this policy forfeited after the alleged breach in each instance, or it would not have received money in payment of premiums, but would have declared the policy void.

"An insurer is estopped to insist on a forfeiture for delay in payment of premiums if his course of conduct has led the insured to believe that the premiums would be received after the appointed day." *Appleton v. Phoenix Mut. Life Ins. Co.,* 47 Am. Rep. 220 (59 N. H. 541).

It was held, in *Hartford etc. Ins. Co. v. Unsell,* 144 U. S. 439, 12 Sup. Ct. 671, 36 L. Ed. 496, that a life insurance company, whose policy provides for the payment of premiums

at stated times, and further that the holder agrees and accepts the same upon the express condition that, if the monthly dues are not paid to said company on the day due, then the certificate shall be null and void and of no effect, may nevertheless, by its whole course of dealing with the assured, and by accepting payments of overdue sums without inquiries as to his health, give him a right to believe that the question of his health would not be considered, and that the company would be willing to take his money shortly after it had become due, and such a course of dealing may amount to a waiver of the conditions of forfeiture.

To the principles announced in those cases, we unhesitatingly give our indorsement, and there appearing to be no errors in the trial of the cause, the judgment is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, CROW, and ROOT, JJ., concur.

[No. 5749. Decided February 26, 1906.]

W. W. HINDMAN, *Relator, Respondent,* v. L. F. BOYD, *as Mayor of the City of Spokane, et al., Appellants.*[1]

APPEAL — DISMISSAL — CESSATION OF CONTROVERSY — INVOLUNTARY COMPLIANCE WITH JUDGMENT. An appeal from a mandate compelling municipal authorities to submit charter amendments to a vote of the people will not be dismissed for the reason that the defendants have complied with the order, where such compliance was involuntary, and only after having been denied a supersedeas of the judgment upon an appeal therefrom.

COURTS—SESSIONS—VISITING JUDGES. Under Const., art. 4, § 7, a visiting judge of the superior court may hold a session of the court at the request of a resident judge, without any request by the governor, and although all of the resident judges are also holding sessions in the same county at the same time.

[1]Reported in 84 Pac. 609.

CONSTITUTIONAL LAW—MANDAMUS. The constitutionality of a law may be raised in mandamus proceedings by ministerial officers proceeded against for its nonenforcement or for noncompliance therewith.

CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—CHARTER AMENDMENTS—EXPENSE OF SUBMISSION—IMPOSITION OF TAX. Laws 1903, p. 393, requiring the municipal authorities to submit to a vote of the people a charter amendment when petitioned so to do by fifteen persons of the qualified voters of the city, thereby compelling the city to incur the expense of such election, is not unconstitutional as imposing a tax upon cities, within the purview of Const., art. 11, § 12, since the constitutional prohibition against the legislature's imposing taxes upon municipalities cannot be held to relate to the expense of such an election thereby preventing the people from exercising a fundamental power, which may be exercised in the manner provided by general laws.

SAME—DELEGATION OF LEGISLATIVE POWER TO PEOPLE—GRANT OF MUNICIPAL FRANCHISES. Bal. Code, § 740, providing that the legislative powers of cities shall be vested in the mayor and city council, does not prevent the adoption of charter amendments requiring the submission of the matter of granting franchises to a vote of the people, and such a charter amendment is not unconstitutional as an unlawful delegation of legislative power to the people.

MUNICIPAL CORPORATIONS—CHARTER AMENDMENTS—QUALIFICATION OF PETITIONERS FOR SUBMISSION. Registration is not a necessary element in the qualification of a voter to entitle him to sign a petition for the submission of charter amendments to a vote of the people, under Laws 1903, p. 393.

SAME — QUALIFICATIONS OF PETITIONERS — EVIDENCE — VERIFICATIONS—COMPETENCY. Affidavits verifying the genuiness of the signatures of petitioners for the submission of charter amendments to a vote of the people under Laws 1903, p. 393, are not competent evidence of the qualifications of the signers.

SAME—DETERMINATION OF CITY COUNCIL. Under Laws 1903, p. 393, it is the duty of the city council to determine in the first instance the qualifications of the signers of a petition for the submission of charter amendments to a vote of the people.

SAME—ANSWER OF CITY—SUFFICIENCY—DEMURRER. In mandamus proceedings to compel a city council to submit charter amendments to a vote of the people, the answer of the city states a valid defense when it puts in issue the qualifications of the signers of the petition and alleges that their signatures were procured by fraud and that the verifications were not properly taken; and it is error to sustain a demurrer thereto.

APPEAL—DECISION. Where, upon an appeal from a writ of mandate requiring the submission of charter amendments to a vote of the people, at the time of the hearing of the appeal the amendment has been submitted to a vote, and carried, the judgment will not be reversed for error in sustaining a demurrer to the answer of the city, but the cause will be remanded for the purpose of taking testimony upon the issues raised.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered March 25, 1905, upon findings in favor of the relator, upon sustaining a demurrer to the answer, granting a mandate to compel the submission of charter amendments to a vote of the people. Remanded for further proceedings.

Danson & Williams, F. M. Dudley, C. P. Lund, H. M. Stephens, and *Turner & Geraghty,* for appellants, contended that, a superior judge cannot, without assignment by the governor, hold court in any other county than that for which he has been elected. Const. art. 4, § 5; Cooley, Const. Lim. (6th ed.), p. 72. The term "qualified elector" or "qualified voter" means one who has the right to vote at an election for public officers. *State ex rel. Knowlton v. Williams,* 5 Wis. 308, 68 Am. Dec. 65; *Beardstown v. Virginia,* 76 Ill. 34; *Board of Comr's v. People ex rel. Love,* 26 Colo. 297, 57 Pac. 1080. To be a qualified voter under our constitution and statutes, the voter must have registered. Const., art. 6, § 7; Pierce's Code, §§ 4889, 4897, 4904; *State ex rel. Woodson v. Brassfield,* 67 Mo. 331; *Smith v. Wilmington,* 98 N. C. 343, 4 S. E. 489; *McDowell v. Massachusetts etc. Const. Co.,* 96 N. C. 514, 2 S. E. 351; *Duke v. Brown,* 96 N. C. 127, 1 S. E. 873; *Southerland v. Goldsboro,* 96 N. C. 49, 1 S. E. 760; *Wood v. Com'rs of Oxford,* 97 N. C. 227, 2 S. E. 653; *Smith v. Board of Com'rs,* 45 Fed. 725. In matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion, or to determine upon the decision which shall be

finally given. High, Extr. Legal Remedies (2d ed.), § 42; *State ex rel. Davey v. Cheetham,* 20 Wash. 64, 54 Pac. 772; *Morris & Whitehead v. Williams* 23 Wash. 459, 63 Pac. 236; *Hester v. Thomson,* 35 Wash. 119, 76 Pac. 734. Under the law it is the duty of the city council to determine the sufficiency of the petitions and the qualifications of the petitioners. *Ayres v. Moan,* 34 Neb. 210, 51 N. W. 830, 15 L. R. A. 501; *La Londe v. Board of Supervisors,* 80 Wis. 380, 49 N. W. 960; *State ex rel. Hawley v. Board of Supervisors,* 88 Wis. 355, 60 N. W. 266; *Crews v. Coffman,* 36 Neb. 824, 55 N. W. 265; *State ex rel. Morgan v. Com'rs of Nemaha County,* 10 Neb. 32, 4 N. W. 373; *State v. Nelson,* 21 Neb. 572, 32 N. W. 589; *Dutten v. Hanover,* 42 Ohio St. 215; *State v. Eggleston,* 34 Kan. 714, 10 Pac. 3; *Mayor of Kokomo v. State ex rel. Adams,* 57 Ind. 152; Charter of Spokane, § 225½. It was proper to refer the petitions to a committee and postpone action until time for an examination. *Dutten v. Hanover,* 42 Ohio St. 215. All names that are fictitious, false, repetitions, or obtained by bribery should be rejected. *Ayres v. Moan* and *Crews v. Coffman, supra.* All who wished to withdraw might do so before the council had ordered the election. *La Londe v. Board of Supervisors, supra.* The act providing for the amendment of city charters (Laws 1903, p. 393, chap. 186), is unconstitutional: (1) As vesting in other than the "corporate authorities" the power to create a debt or impose a tax. Const., art. 11, § 12; Const. (1848) Illinois, art. 9, § 5; *Updike v. Wright,* 81 Ill. 49; *People ex rel. McCagg v. Mayor of Chicago,* 51 Ill. 17; *Lovingston v. Wider,* 53 Ill. 302. (2) Because the subject is not properly expressed in the title. Const., art. 2, § 19. The rights to be granted under the proposed amendment are franchises, the granting of which is a legislative power, primarily resting in the state, now vested by the legislature in the municipality and of which power said amendment would effect a delegation contrary to the constitution. Bal. Code, § 740, Laws 1890, p. 223, § 6; Smith, Law of Mun. Corp., § 1702; *Schwede v.*

Hemrich Bros. Brew. Co., 29 Wash. 21, 69 Pac. 362; *Commercial Elec. L. & P. Co. v. Tacoma*, 17 Wash. 661, 50 Pac. 592; *State ex rel. Attorney General v. Seattle Gas etc. Co.*, 28 Wash. 488, 68 Pac. 946, 70 Pac. 114; *State ex rel. Grinsfelder v. Spokane St. R. Co.*, 19 Wash. 518, 53 Pac. 719, 67 Am. St. 739, 41 L. R. A. 515; McQuillan, Mun. Ordinances, §§ 565, 567; Nellis, Street Surface Railroads, pp. 12, 13; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *State ex rel. Attorney General v. Madison St. R. Co.*, 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771; Cooley, Const. Lim. (6th ed.), 137, 138; Const., art. 2, § 1; Bal. Code, § 739; *In re Cloherty*, 2 Wash. 137, 27 Pac. 1064; *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847; *Tacoma Gas etc. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655; *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106. A judgment that is absolutely void may be attacked at any time in any court. Black, Judgments, § 307; *In re Yamashita*, 30 Wash. 234, 70 Pac. 482; *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446. An appeal lies from a void judgment entered without jurisdiction. *Fox v. Nachtsheim*, 3 Wash. 684, 29 Pac. 140; *Sheppard v. Guisler*, 10 Wash. 41, 38 Pac. 759; *State ex rel. Hibbard & Co. v. Superior Court*, 21 Wash. 631, 59 Pac. 505; *State ex rel. Washington etc. Imp. Co. v. Moore*, 21 Wash. 629, 59 Pac. 505.

James T. Burcham, Chas. A. Murray, Merritt & Merritt, and *Happy & Hindman*, for respondent, contended, *inter alia*, that, the visiting judge had authority to preside upon invitation of a local judge. Const., art. 4, §§ 5, 7; *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; *State ex. rel. Coughill v. Sachs*, 3 Wash. 691, 29 Pac. 446; *First Nat. Bank v. Parker*, 28 Wash. 234, 68 Pac. 756. Appellants waived their objection to the jurisdiction. 2 Cyc. Law & Procedure, p. 660. If the judgment was void it will not support an appeal. Freeman, Judgments, § 117; *State ex rel. Crow v. Crook*, 123 Ala. 657, 27 South. 334; *Gunter v. Mason*,

125 Ala. 644, 27 South. 843. Registration is not a qualification of voters but a mere regulation of the right of franchise. Const., art. 6, §§ 1-7; *Capen v. Foster,* 12 Pick. 485, 23 Am. Dec. 632; *State v. Corner,* 22 Neb. 265, 3 Am. St. 267; *State v. Butts,* 31 Kan. 537, 2 Pac. 618; Cooley, Const. Lim., 602; *People v. Hoffman,* 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; *Webster v. Byrnes,* 24 Cal. 273; *Edmonds v. Bandbury,* 28 Iowa 267, 4 Am. Rep. 177; *Auld v. Walton,* 12 La. 129; *Hyde v. Brush,* 34 Conn. 454; *Patterson v. Barlow,* 60 Pa. St. 54; *State ex rel. Wood v. Baker,* 38 Wis. 71; *White v. Reagan,* 25 Ark. 622; *Daggett v. Hudson,* 43 Ohio St. 548, 54 Am. Rep. 832; *Stallcup v. Tacoma,* 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25; Pierce's Code, § 4767; Laws 1901, p. 284; *Smith v. Board of Com'rs,* 45 Fed. 725; McCrary, Elections (4th ed.), §§ 100, 127-134; *Smith v. Wilmington,* 98 N. C. 343, 4 S. E. 489. Where allegations of a special defense amount to qualifications of a general denial they control and limit it to that extent. *Lamberton v. Shannon,* 13 Wash. 404, 43 Pac. 336; *Queen Ins. Co. v. Hudnut Co.,* 8 Ind. App. 22, 35 N. E. 397; *Warbritton v. Demorett,* 129 Ind. 346, 27 N. E. 730, 28 N. E. 613; *Derby v. Gallup,* 5 Minn. 119; *Wiley v. Keokuk,* 6 Kan. 94; *Barnum v. Kennedy,* 21 Kan. 181. It was appellants' duty to indicate in their answer the invalid names, if any, in the petition. *Schwarz v. Garfield County Court,* 14 Colo. 44, 23 Pac. 84; *Paulk v. Lee,* 117 Ga. 6, 43 S. E. 368; *Preston v. Culbertson,* 58 Cal. 198; *Lunsford v. Culton,* 15 Ky. Law 504, 23 S. W. 946; *State ex rel. Bourgeois v. Laizer,* 77 Miss. 146, 25 South. 153. An allegation upon belief is equivalent to a direct allegation. *Radway v. Mather,* 7 N. Y. Super. (5 Sandf.) 654; *Howell v. Fraser,* 6 How. Pr. 221; *McFarland v. Muscatine,* 98 Iowa 199, 67 N. W. 233; *Warburton v. Ralph,* 9 Wash. 537, 38 Pac. 140. The constitutionality of the act of 1903 cannot be raised in this proceeding. *People ex rel. Attorney General v. Salomon,* 54 Ill. 39; *Smyth v.*

Titcomb, 31 Maine 272; *Thoreson v. State Board of Examiners,* 19 Utah 18, 57 Pac. 175; *State ex rel. Morris v. Secretary of State,* 43 La. Ann. 590, 9 South. 776; *Commonwealth v. James,* 135 Pa. St. 480, 19 Atl. 950. The validity of the act of 1903 is supported by the following authorities: *Baker v. Seattle,* 2 Wash. 576, 27 Pac. 462; *State ex rel. Seattle v. Carson,* 6 Wash. 250, 33 Pac. 428; *State ex rel. Olmstead v. Mudgett,* 21 Wash. 99, 57 Pac. 351; *Seattle v. Chin Let,* 19 Wash. 38, 52 Pac. 324; *Smith v. Seattle,* 25 Wash. 300, 65 Pac. 612; *Tacoma etc. Light Co. v. Tacoma,* 14 Wash. 288, 44 Pac. 655; *Reeves v. Anderson,* 13 Wash. 17, 42 Pac. 625; *State ex rel. Seattle v. Carson,* 6 Wash. 250, 33 Pac. 428; *State ex rel. Cole v. New Whatcom,* 3 Wash. 7, 27 Pac. 1020; *DeMattos v. New Whatcom,* 4 Wash. 127, 29 Pac. 933; *State ex rel. Snell v. Warner,* 4 Wash. 773, 31 Pac. 25, 17 L. R. A. 263; *Kuhn v. Port Townsend,* 12 Wash. 605, 41 Pac. 923, 50 Am. St. 911, 29 L. R. A. 445; Const., art. 11, § 12; *Marshall v. Silliman,* 61 Ill. 218; *People ex rel. Wilson v. Salomon,* 51 Ill. 57; *Lancey v. King County,* 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817. The appellants' contention that the charter amendment attempts to do an unconstitutional thing is unsound. *Hooper v. Emery,* 14 Maine 375; *Commercial Elec. L. & P. Co. v. Tacoma,* 17 Wash. 661, 50 Pac. 592; *State ex rel. Grinsfelder v. Spokane Street R. Co.,* 19 Wash. 518, 53 Pac. 719, 67 Am. St. 739, 41 L. R. A. 515; *State v. Cincinnati Gaslight etc. Co.,* 18 Ohio St. 262; *Walla Walla v. Walla Walla Water Co.,* 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; *People ex rel. Board of Com'rs v. Common Council,* 28 Mich. 228, 15 Am. Rep. 202; *Reeves v. Anderson, supra; State v. Pullman,* 23 Wash. 583, 63 Pac. 265, 83 Am. St. 836; *Territory ex rel. Kelly v. Stewart,* 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106; Bal. Code, § 740.

HADLEY, J.—This is a proceeding in mandamus. Application was made to the superior court of Spokane county for a writ of mandate directed to the mayor, city councilmen

and city clerk of the city of Spokane, requiring them to submit to a vote of the people of said city a proposed amendment to the city charter governing the manner of granting certain franchises in the city. The affidavit in support of the application for the writ alleges, that more than seventeen hundred of the qualified voters of the city, a number equal to more than fifteen per cent of the total number of votes cast at the last preceding municipal election, have petitioned the city council to submit said proposed charter amendment at the next regular municipal election. It is averred that the council refused to take any action toward the submission of the proposed amendment, and that the relator believes the council does not intend to comply with the petitions and submit the amendment.

Application for the writ was made March 22, 1905, and on the same day the court made an order directing that an alternative writ should issue, and that the same should be made returnable on the 25th day of March, 1905. An alternative writ was issued accordingly. The defendants to the writ interposed some preliminary motions and demurrers attacking the writ, which were overruled, and thereafter they made return by way of answer. The answer denies that the petitions were signed by qualified voters equal in number to fifteen per cent of the total votes cast at the last preceding municipal election, and denies that the council refused to take any action toward the submission of the proposed amendment, or that it has done nothing in respect thereto. It is also affirmatively alleged that the various petitions which have been filed with the city clerk were obtained by fraud in obtaining the signatures thereto of a large number of individuals who were not, and are not, qualified voters of the city; that the verifications made to the petitions were made by persons who did not see the signatures made, who did not know the individuals who signed them, who were unacquainted with the signatures of the signers, and who had no knowledge of the individuals or of the signing of the peti-

tions; that the petitions were falsely verified for the fraudulent purpose of misleading the members of the council and inducing them to submit the proposed amendment in violation of law, and to thereby incur an expenditure and debt on the part of the city, unauthorized by law. It is further alleged that the demand for the submission of the amendment was made upon the council on March 21, 1905, and that the petitions were at once referred to the committee of the whole for the purpose of investigating them and ascertaining whether they were signed by the qualified voters of the city equal in number to fifteen per cent of the persons who voted at the last municipal election; that within the short time that has since elapsed the investigation has disclosed the above stated facts with reference to the procurement of signatures and the verifications of the petitions; that after striking or rejecting the names of those who were not qualified voters, the number left does not equal fifteen per cent of the persons who voted at the last municipal election. The answer contains other affirmative matter to which we need not refer at this time.

When the cause came on for hearing, the relator interposed a general demurrer to the whole answer, and the same was by the court sustained, to which ruling exception was taken. Relator then called as a witness the city clerk of the city, who identified the several petitions for the submission of the proposed amendment as being records and files in his office, and they were thereupon admitted in evidence. The relator then rested, and inasmuch as the defendants to the writ were left without pleadings by reason of the ruling of the court on the demurrer to their answer, they offered no testimony. A judgment directing a peremptory writ of mandate was then entered, and this appeal is from that judgment.

Respondent has moved to dismiss the appeal, on the ground, as he alleges, that the controversy has ceased, for the reason that the appellants have by their acts waived their right to

appeal. In support of this contention, it is brought to our attention that, after the judgment was rendered in this cause below, the appellants did submit the proposed charter amendment to a vote of the people. It further appears, however, that their acts in that regard were because of the mandate of the court below, which peremptorily commanded them to submit the amendment. They had previously appealed to this court from the judgment below, and had applied to the trial court for an order fixing the amount of the supersedeas bond pending the appeal, which was denied. Application was then promptly made to this court for a writ of mandate directed to the lower court, compelling it to fix the amount of a supersedeas bond. That application was also denied. Under such circumstances appellants obeyed the mandate of the court below, and it cannot be said that their action was voluntary. They have not waived their contention by any voluntary act of their own, but have acted solely in obedience to judicial command, and under such circumstances their right to have the action of the court reviewed on appeal should not be denied. *Dodds v. Gregson,* 35 Wash. 402, 77 Pac. 791. Other grounds mentioned in the motion to dismiss the appeal we think are also insufficient, and the motion is denied.

The first point urged by appellants is that the judge who tried this cause was not competent to sit as a court under the circumstances. The Honorable W. T. Warren, a regularly qualified judge of the superior court for the counties of Lincoln and Adams, was at the time acting as a judge in Spokane county, at the request of the Honorable Henry L. Kennan, one of the judges for Spokane county, It is argued that, under the statutes of this state, Spokane county is entitled to have, and does have, three superior judges; that on the day this cause was heard, each of said judges held a session of said court in Spokane county, and that inasmuch as Judge Warren was not assigned by the governor of the state to act in Spokane county at the time, he therefore acted without

authority. This contention is based upon art. 4, § 5, of the state constitution, the pertinent portion of which is as follows:

"In any county where there shall be more than one superior judge, there may be as many sessions of the superior court at the same time as there are judges thereof, and whenever the governor shall direct a superior judge to hold court in any county other than that for which he has been elected, there may be as many sessions of the superior court in said county at the same time as there are judges therein or assigned to duty therein by the governor."

It is contended that, under the above provision, there could have been but three sessions of the superior court in Spokane county on the day in question, unless additional judges had been assigned thereto by the governor. Section 7, art. 4, of the constitution, however, provides as follows:

"The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his duty to do so."

Under the last quoted provision it is clear that a visiting judge may act at the request of a resident judge and without the request of the governor, and that upon the request of the latter it becomes his duty to do so. The two provisions must be construed together so as to give harmonious effect if possible. It is clear that the constitution designates two methods for the assignment of visiting judges. If the above portion of § 7 should be read as a part of § 5, and it may properly be so read, then we think the intention appears that there may be as many sessions in a county at one time as there are local and assigned judges. We therefore believe that the provision of § 7 should be held to be a mere enlargement of that in § 5, to the effect that there may be as many sessions as there are resident judges and additional assigned judges, whether assigned by the governor or by request of a local judge. We therefore hold that the trial judge was competent to act.

The important question presented by the appeal is, Did

the court err in sustaining the demurrer to the answer? Appellants present several reasons which they urge against the ruling on the demurrer. The answer expressly challenges the constitutionality of the act of 1903, chapter 186, page 393, of the session laws of that year. It was by authority of that act that the action of the council was invoked for the submission of the proposed amendment. By reference to the statute it will be seen that, when qualified voters of the city, equal in number to fifteen per cent of the total number of votes cast at the last municipal election, shall petition the city council for the submission of a proposed charter amendment, it becomes the duty of the council to submit the question at the next regular municipal election, occurring thirty days or more after the petition is filed. The answer avers that the publication of the necessary notice of the proposed amendment and the submission thereof will compel the city to incur an indebtedness of at least $500, and it is argued that, under the constitution of the state, the legislature cannot compel the city council to incur a debt; whereas, under the said act of 1903, the city will be compelled to incur a debt every time a petition properly signed, together with a proposed amendment, shall be presented, and that, too, regardless of the consent of the corporate authorities, the mayor and council. In this connection appellants invoke the provisions of art. 11, § 12, of the state constitution, the section being as follows:

"The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

It is contended that the act of 1903 violates the above provision, in that it attempts to vest in other than the corporate authorities the power to create a debt or impose a tax, even against the will of the corporate authorities.

Respondent insists that appellants occupy the position of mere ministerial officers, and that in a mandamus proceeding such officers are not entitled to raise the question of the constitutionality of a statute which defines the duty sought to be enforced. The authorities are much in conflict upon this subject. No decision of this court has been called to our attention where the actual right to raise such a constitutional question in a mandamus case was discussed, but this court has passed upon the constitutional question in a mandamus case. *State ex rel. Olmstead v. Mudgett,* 21 Wash. 99, 57 Pac. 351. We prefer to follow the authorities which hold that the constitutional question may be raised even in mandamus proceedings, for the reason that such a rule leads to the immediate settlement of the question without repeated litigation.

It is the evident policy of the state constitution that the charters of cities of the first class and amendments thereto shall be subject to the control of general laws. Const., art. 11, § 10. The power is vested in the people to adopt their own charter, and also to amend it; but the matter is subject to the control of general laws. By the act in question, the legislature has, by a general law, simply designated a method by which the charter may be amended. The adoption of a charter or the amendment thereof is the act of the people, and not of the corporate authorities. It involves a power which is superior to that of the corporate authorities, and there must be some reasonable method by which that power can be exercised independently of the will of the constituted authorities. We think the constitutional provision invoked by appellants must be held to relate to the imposition of taxes concerning ordinary corporate affairs incidental to the existence of the organized corporation. To hold that it relates also to the expense of an amendment to the organic law of the city would place it within the power of the corporate authorities to perpetually prevent the people from exercising a fundamental power. The power resides with the people, its

exercise may be in the manner provided by general laws, and the expense thereof is not necessarily at the will of the corporate authorities, as in the case of ordinary obligations incurred by the corporate government. We therefore hold that the act is not unconstitutional in the particular above discussed. We think, also, that the objection to the title of the act is not well taken.

It is next urged that the proposed charter amendment would operate to delegate legislative power to the people, which is now vested in the mayor and city council. The proposed amendment provides that, whenever any ordinance granting or amending any franchise for gas, electric light, water, telephone, or telegraph purposes, shall have been introduced, then the council may, and upon the presentation of a petition signed by the electors of the city equal in number to fifteen per cent of the entire vote cast at the last municipal election, the council shall submit to a vote of the people the question of the adoption of the franchise; and if a majority of the qualified voters voting thereon at the election shall approve the ordinance, it shall take effect; but otherwise it shall be defeated. It is contended that the granting of a franchise is the exercise of a legislative function, and that the proposed amendment divests the mayor and the council of the power to exercise it. This contention is based upon the statute as found in Bal. Code, § 740, which provides that the legislative powers shall be vested in a mayor and city council. Speaking, however, with reference to the powers of the mayor and council, the same section says, "to have such powers as may be provided for in its charter." It is clear, therefore, that the powers of the mayor and council are such as are granted by the charter. If the people choose to provide in their charter that the power to grant franchises of a given character shall not be given wholly to the mayor and council, but shall be reserved to themselves, can it be said that the granting thereof is such a legislative act as cannot be exercised by the people themselves? The

power to make a charter is in a sense a legislative one. It is well known that charters so made often contain much that is legislative in its nature, such as the adoption of a complete scheme for making special assessments and other similar elaborate and detailed provisions. It is practically conceded by appellants that, if the statute, § 740, *supra,* were not in existence, it would lie with the people to discharge legislative functions. It is contended, however, that the statute is in full force, and that it is prohibitive of legislation in any manner except by the mayor and council. It is argued that the act of 1903 in no way affects the provisions of said § 740. It is true the act does not refer to the former statute, but if it reaches the same subject it should be held to affect the older statute in so far as it treats of the same subject. The later act provides that charters may be amended in the manner outlined, "providing for any matter within the realm of local affairs or municipal business." The terms could not be broader and, if the former statute can be said to have vested the power to legislate with respect to franchises exclusively in the mayor and council, the later one authorizes the people to reserve that power to themselves, since they may amend the charter providing for any matter "within the realm of local affairs." It has been held that the granting of such privileges as are mentioned in the proposed amendment rests in contract or license in the nature of a local easement. *Maybury v. Mutual Gas Light Co.,* 38 Mich. 154. We therefore believe that the power to grant such privileges rests with the people, if they so provide in their charter. The proposed amendment seeks to do this, and we think it is not invalid for the reason discussed.

Referring now to the issue made by the answer, that the petitions to submit the proposed amendment did not contain the requisite number of qaulified voters, we find that appellants in their briefs have discussed much the subject of registration as pertinent to the qualification of a voter. They maintain that the term "qualified voters," as used in the

statute of 1903, necessarily means such only as have duly registered during a current year. Article 6, § 1, of the state constitution, defines who are qualified voters as follows:

"All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections. They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language; . . ."

It will be seen that registration is not an element entering into the definition of a qualified voter. It is held by eminent authority that registration laws cannot be justly regarded as adding a new qualification to those prescribed by the constitution, but that they are merely reasonable and convenient regulations prescribing the mode of exercising the right to vote. *Capen v. Foster,* 12 Pick. 485, 23 Am. Dec. 632; *State ex rel. Stearns v. Corner,* 22 Neb. 265, 3 Am. St. 267; *State v. Butts,* 31 Kan. 537, 2 Pac. 618; *People v. Hoffman,* 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; *Edmonds v. Banbury,* 28 Iowa 267, 4 Am. Rep. 177; Cooley, Const. Lim. (6th ed.), 757. In harmony with the foregoing and other authorities which might be cited, it is held here that registration is not a necessary element in a qualification of a voter to entitle him to sign a petition under the aforesaid act of 1903.

Appellants, however, urge that, under their answer and without regard to the question of registration, the issue was made that the petitions were lacking in the requisite number of qualified voters. The issue is so squarely made, both by the denials and by affirmative allegations. The court, at the time of the trial, sustained a demurrer which was then orally interposed and which was stated by counsel as going to the whole answer. The court seemed to be of the view that appellants were not entitled to raise any issue as against

the sufficiency of the petitions. The only proof required on the part of the relator was the identification of the petitions as having been filed with the city clerk. No proof was required or made as to the qualifications of the signers of the petitions, although the averments of relator's affidavit in that regard were denied. It is true the petitions were verified by appended affidavits, stating that the signers were qualified voters; but that was the statement of a mere conclusion not based upon any stated facts. And, moreover, the statute of 1903 does not authorize such a verification. It provides that the verification shall go only to the genuineness of the signatures. The affidavits were, therefore, not competent proof of the qualification of the signers. The statute provides no method for determining the qualification of the petitioners. It must follow, therefore, that it lies with the city council, whose action in the premises is invoked, to determine that question in some reasonable manner, and within a reasonable time. Clearly the statute does not intend that the council shall submit the amendment until the fact exists that the necessary number of qualified voters have petitioned. Some one must determine that fact, and under the statute it must lie with the council to pass upon it in the first instance. It is generally held, under similar statutes, that it is the duty of the body to whom petitions for the submission of questions to the voters are presented to carefully scrutinize, examine, and determine as to the number and qualification of the signers before putting the people to the expense of an election. *Ayres v. Moan,* 34 Neb. 210, 51 N. W. 830, 15 L. R. A. 501; *La Londe v. Board of Supervisors,* 80 Wis. 380, 49 N. W. 960; *Dutten v. Hanover,* 42 Ohio St. 215; *State v. Eggleston,* 34 Kan. 714, 10 Pac. 3.

The answer not only put in issue the qualification of the requisite number of voters, but also alleged that many signatures were obtained through fraudulent representation; that

the signers did not understand the effect of what they signed, and that the verifications of the petitions as to the genuineness of the signatures were made by persons who neither knew the signatures nor the persons. It is argued that the council were not acting in good faith, and that they were unnecessarily delaying action. The record does not present such features as would warrant us in saying that such was the fact. In any event, when the matter came on for trial, the court should have heard such evidence as they were prepared to offer in support of the issues which they tendered. With the issues thus standing, the court did not direct appellants to proceed to act and investigate the necessary preliminary facts, but ordered them to submit the amendment to a vote without regard to any ascertainment of such facts. In short, the record as it stands discloses that appellants stood ready to show to the court that the petitions were not such as the law requires, but they were denied the right to do so. Such was, we think, clearly error.

We are therefore confronted with the problem as to what disposition should be made of the case under all the circumstances. We have passed upon and settled all questions raised in the case, except as to the issue upon the sufficiency and validity of the petitions. It is conceded that upon those petitions the amendment was submitted to a vote of the people and was carried. The situation is therefore one of public interest. The expense of an election has been incurred, and if the petitions for the submission were valid, the vote upon the amendment was effective. We have, therefore, decided that we shall directly neither affirm nor reverse the judgment which ordered the writ of mandate, but the cause is remanded with instructions to take testimony upon the necessary facts concerning the validity of the petitions, and to enter findings thereon. If the findings shall establish facts showing that the petitions were in compliance with the law, then an order shall be entered confirming and ratifying the one originally

made. But if the facts shall be found otherwise, the judgment shall be vacated, and the action dismissed.

MOUNT, C. J., CROW, DUNBAR, and ROOT, JJ., concur.

[No. 6084. Decided February 27, 1906.] 42 35 | 42 607

GEORGE R. E. MONK *et al., Appellants,* v. THE CITY OF BALLARD, *Respondent.*[1]

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—NOTICE. Notice of the hearing of objections to a proposed assessment for the construction of a sewer, which is not required by statute, does not constitute constructive notice to the property owners, and cannot have a binding effect on them, or estop them from subsequently objecting to the proceedings.

SAME—PUBLICATION OF ORDINANCE. The publication of an ordinance, as by statute required, that the city was about to create an assessment district for the construction of a sewer, is constructive notice to the owners of contiguous property sufficient to put them upon inquiry as to the fact of an assessment of their property therefor.

SAME—ACTION TO ANNUL ASSESSMENT—DILIGENCE. An action to annul a special assessment to pay the cost of the construction of a sewer is commenced within a reasonable time when it is brought by the owners of contiguous property within thirty days after the going into effect of the ordinance approving the assessment roll.

SAME—ASSESSMENT ACCORDING TO VALUATIONS—BENEFITS. A local assessment upon contiguous property to pay the cost of the construction of a sewer, levied upon all of the property in the assessment district, in proportion to the assessment of the property for general taxation, is invalid, being in violation of Const., art. 7, § 9, providing that such assessments for local improvements shall be by special assessment upon the property benefited.

SAME—ASSESSMENT FOR SEWER—APPROXIMATE PROPERTY. In case of local assessments to pay for the construction of a sewer, property legally assessable therefor as "approximate thereto" must be so situated as to be capable of using the sewer or deriving a special advantage therefrom, different in character from that enjoyed by the general public.

[1]Reported in 84 Pac. 397.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 6, 1905, upon findings in favor of the defendant after a trial before the court without a jury, dismissing on the merits, on action to annul a special assessment. Reversed.

Shank & Smith, for appellants, contended, *inter alia,* that, in the absence of statutory provisions making the action of the council conclusive, this court has repeatedly held assessments void, regardless of failure to protest to the council. *Howell v. Tacoma,* 3 Wash. 711, *Elma v. Carney,* 9 Wash. 466, 37 Pac. 707; *Buckley v. Tacoma,* 9 Wash. 253, 37 Pac. 441; *New Whatcom v. Bellingham Bay Imp. Co.,* 9 Wash. 639, 38 Pac. 163; *Id.,* 10 Wash. 378, 38 Pac. 1024; *Haisch v. Seattle,* 10 Wash. 435, 38 Pac. 1131; *Kline v. Tacoma,* 11 Wash. 193, 39 Pac. 453. Actual special benefit is an essential element of valid special assessments for local improvements. *Vancouver v. Wintler,* 8 Wash. 378, 36 Pac. 278, 685; *Howell v. Tacoma, Elma v. Carney, New Whatcom v. Bellingham Bay Imp. Co., Haisch v. Seattle* and *Kline v. Tacoma, supra; In re Westlake Avenue,* 40 Wash. 144, 82 Pac. 279; *Hanscom v. Omaha,* 11 Neb. 37, 7 N. W. 739; *Paulson v. Portland,* 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673; *Oregon etc. R. Co. v. Portland,* 25 Ore. 229, 35 Pac. 452, 22 L. R. A. 713; *Gilmore v. Hentig,* 33 Kan. 156, 5 Pac. 781; *Thomas v. Gain,* 35 Mich. 155, 24 Am. Rep. 535; *Lee v. Ruggles,* 62 Ill. 427; Note, 14 L. R. A. 755-759. A tax is not a debt, and does not bear interest in the absence of statutory provision. *Lane County v. Oregon,* 74 U. S. 71, 19 L. Ed. 101; *Perry v. Washburn,* 20 Cal. 318; 27 Am. & Eng. Ency. Law (2d ed.), 777; 25 Id. 1231, and cases in note; *Seattle v. Whittlesey,* 17 Wash. 292, 49 Pac. 489; *Haskell v. Bartlett,* 34 Cal. 281.

M. H. Ingersoll, for respondent, contended that, if a landowner does not protest against an improvement when given an opportunity, he is precluded from raising any objections

not going to the jurisdiction of the municipality to make the assessment. *New Whatcom v. Bellingham Bay Imp. Co.,* 16 Wash. 131, 47 Pac. 236; *Tumwater v. Pix,* 18 Wash. 153, 51 Pac. 353; *Northwestern etc. Bank v. Spokane,* 18 Wash. 456, 51 Pac. 1070; *Heath v. McCrea,* 20 Wash. 342, 55 Pac. 432; *Annie Wright Seminary v. Tacoma,* 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma,* 24 Wash. 591, 64 Pac. 791; *Potter v. Whatcom,* 25 Wash. 207, 65 Pac. 197; *Young v. Tacoma,* 31 Wash. 153, 71 Pac. 742; *Alexander v. Tacoma,* 35 Wash. 366, 77 Pac. 686; *O'Dea v. Mitchell,* 144 Cal. 374, 77 Pac. 1020; *Duncan v. Ramish,* 142 Cal. 686, 76 Pac. 661; *Wolff v. Denver* (Colo. App.), 77 Pac. 364. Appellants' property was contiguous. *Guild v. Chicago,* 82 Ill. 472; *Matthews v. Kimball,* 70 Ark. 451, 66 S. W. 651, 69 S. W. 547; *Meissner v. Toledo,* 31 Ohio St. 387; *Little Rock v. Katzenstein,* 52 Ark. 107, 12 S. W. 198; *Louisville etc. R. Co. v. East St. Louis,* 134 Ill. 656, 25 N. E. 962; *In re West Lake Avenue,* 40 Wash. 144, 82 Pac. 279. Even if part of appellants' lands are too low to be drained into the sewer, they are not for that reason exempt from assessment. *Boeres v. Strader,* 13 Ohio Dec. (reprint) 414; *Downer v. Boston,* 7 Cush. 277. The city council has exclusive discretion in all matters relating to street improvements and property benefited thereby. *Haisch v. Seattle,* 10 Wash. 435, 38 Pac. 1131; Elliott, Roads & Streets, 375; Cooley, Taxation, 661. Courts will not undertake to control the discretion of the officers of a municipal corporation. *Paulson v. Portland,* 16 Ore. 450, 19 Pac. 450, 1 L. R. A. 673; *Haisch v. Seattle, supra.*

Root, J.—This is an action on the part of appellants to annul a special assessment, made upon their lands by the respondent to assist in the payment for the construction of a sewer. Judgment went against appellants, denying their prayer for relief, and granting to respondent a judgment and decree of foreclosure for the amount assessed on the lands affected. Respondent's council, on June 30, 1903, enacted

ordinance No. 645, wherein it declared its intention to construct a main sewer on Sixth avenue west, and to establish an assessment district, and to assess the cost "against all the property included within such district which is contiguous or approximate to such streets in which such main sewer is placed, by levying special taxes upon such property within such sewer district in accordance with the last general assessment of the land, exclusive of all improvements, for city purposes," as provided by chapter 126, Laws of 1899, as amended by chapter 27, Laws of 1903. The ordinance estimated the cost and provided that all but $2,300 should be assessed against all the property within and comprising said assessment district.

Provision was made for the hearing of protests against the improvement on July 14. No protests were made or filed by these appellants. On the day last named, ordinance 653 was enacted, ordering the work and establishing the assessment district, as proposed by ordinance 645. Thereafter the sewer was constructed. On January 26, 1904, an assessment roll was reported to the council, levying a tax on all the land in the district theretofore created, and the city council by a resolution directed that objections to the roll should be made on February 9, at 8 p. m., and notice thereof should be published. Such notice was published January 30, and February 6. When the council convened at the time appointed, no objections were made or filed. Whereupon the assessment roll was adopted, and the tax levied by ordinance 742, which went into effect February 15. On the 13th of February, the city treasurer published a notice that said assessment roll had been certified to him for collection and that the assessments would be delinquent within thirty days; and if not paid, interest and penalty would be added, and the various lots and parcels of land sold to pay the respective amounts due thereon. This action was instituted March 14, 1904.

It is contended by appellants that their property covered

by this assessment, or at least a considerable portion of it, was so situated as to be physically incapable of deriving benefit from the construction, existence and maintenance of the sewer referred to. As to part of the property (tide lands) there would seem to be much force in this contention. But in view of the conclusion which we have reached upon another branch of the case, it is unnecessary for us to pass upon this question.

It is urged by respondent that appellants cannot question this assessment, for the reason that they did not appear and object at the time appointed for the hearing of protests against the making of the improvement, nor at the time appointed for the hearing of objections to the approval of the assessment roll. Appellants claim, and it seems not to be disputed, that they had no actual notice of their property being included in this assessment district, or of its being covered by the assessment roll, until they received notification from the city treasurer that the assessment roll had been certified to him for collection, which was only about a month before this action was commenced. They point out that the statute does not require nor make any provision for the giving of a notice by the city of the hearing of objections to the proposed assessment roll, and contend that the notice which the city published requiring all persons to appear and make any objections they might have to said assessment roll was a voluntary proceeding on the part of the city, not authorized, required, or provided for by any statute, and, consequently, not binding upon any one; that said notice, not being provided for by law, could not be such as to amount to constructive notice to appellants, and the neglect or refusal of the latter to appear at the time indicated by said notice could in no manner affect their rights or preclude or estop them from taking appropriate action thereafter to preserve or protect any rights and interests which might be affected or threatened by any procedure which the city or its officers

should attempt to take pursuant to said special assessment proceedings.

We are inclined to think that appellants' contention must be sustained. The notice, not being one required by the statute, could not constitute constructive or other notice to these appellants, and could have no legal binding effect upon them. They were, therefore, not bound by the action of the city council ratifying said assessment roll, but were at liberty to challenge the correctness of the same and to interfere with any attempt which the city should make to enforce the same if illegal, against their property, providing they began their proceeding to do so within a reasonable time after said assessment roll was approved and adopted and the tax levied. The publication of the ordinance declaring the intention of the city to make this improvement, and requiring any and all persons whose property was therein described to appear at a certain time and show cause, if any they had, why the said improvement should not be made and the district formed as therein suggested, doubtless constituted constructive notice to all persons owning property in said district which property was contiguous or approximate to any street or sewer, that the city was about to make said improvement and establish such district, and that the same would naturally culminate in the making of an assessment and levy of a tax on the property therein described. We think the publication of this ordinance, as by the statute required, was sufficient to put all such owners of such assessable property on the lookout and inquiry as to the time and fact of an assessment roll being made, approved, and certified to the city treasurer; and it would consequently be the duty of any owner of assessable property in said district, who felt himself aggrieved by the attempted assessment, to begin promptly such action as would be calculated to afford him relief against any illegal and unjust tax purporting to be levied against his property in and by said assessment roll. These appellants, having commenced their action within thirty days from the

time the ordinance went into effect, approving the assessment roll, we think were within a reasonable time.

It is urged by appellants that the tax sought to be levied was invalid and voidable, because made upon a basis which renders it obnoxious to the constitution. It is their contention that the special assessment for this sewer should have been levied upon the property benefited thereby proportionately to the benefits, instead of being levied upon all of the property in the district "in accordance with the last general assessment on the land, exclusive of all improvements, within said district for city purposes." We think this contention cannot be upheld. Section 9, art. 7, of the state constitution, has the following: "The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited." In the case at bar the ordinances providing for the improvement and for the assessment do not purport to levy the assessment and tax according to benefits, or solely upon property benefited; but a district is created and a tax levied upon all of the property in the district, after stating in the first ordinance an intention to assess the costs and expense of the improvement upon the property in said district which was "contiguous and approximate to said streets, according to the last general assessment." In the matter of special assessments to pay for local improvements, a statute is doubtless constitutional which provides that the cost shall be apportioned according to benefits, or upon the property benefited according to value of the property assessed, if the assessment be not in excess of benefits derived. The law in question may be construed as having these limitations, and is therefore doubtless valid. But it is evident that the assessment sought to be made herein was not in compliance with the statute so interpreted. The provisions in the ordinances are not consistent with one another or with the statute. An ordinance was enacted creating an assessment district. It does not appear that all of

the property included within the district is "contiguous or approximate to any street in which any main pipe or lateral pipe of such sewer" was placed, or intended to be constructed, as required by the statute. The assessment was levied upon *all* of the land in the district, regardless of any showing or finding as to its being "contiguous or approximate" to such streets, or of being specially benefited. Appellants maintain that their property is not "contiguous or approximate" to any street occupied, or to be occupied, by any pipe of such sewer or any of its laterals. It is admitted not to be contiguous. The question arises as to the meaning of the term "approximate." In this statute we think this word should have a more restricted meaning than in one providing a means of assessment to pay for improving a street, highway, park, or public place. In such cases the owner of property somewhat removed from, and not abutting upon, or contiguous to, the given street or public place, may nevertheless be able to reach such improved place so readily from his property as to give the latter a special benefit by reason of said improvement. But where the improvement is a sewer, it would seem that there could be no intent to pay for it by a special assessment, unless the property be so situated as to be capable of using the sewer or of deriving from its construction a special advantage different in character from that enjoyed by the public generally. In order for a sewer to be susceptible of use to a given parcel of land, there must be access from said land to said sewer without passing through the property of other individuals. If there be no street, alley, or other public way by or through which such land may be connected with the sewer, we do not believe it can be deemed to be "approximate" within the meaning of the statute in question, unless the sewer in some manner affords the property, on account of its location, a peculiar advantage or special benefit not shared in kind by other property not so situated.

We think the assessment attempted to be levied by this

proceeding upon appellants' land was voidable; and they having taken this proceeding timely to set the same aside, a judgment in their favor should be rendered. The judgment of the honorable superior court is reversed, and the cause remanded with instructions to grant the relief prayed for in the complaint.

MOUNT, C. J., CROW, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

[No. 5881. Decided February 28, 1906.]

MARTIN J. KALEZ *et al., Appellants,* v. SPOKANE VALLEY LAND AND WATER COMPANY, *Respondent.*[1]

NAVIGABLE WATERS—WHAT ARE. A small lake having an average depth of sixteen feet, upon which there is operated one steamboat and numerous small pleasure boats used mostly for pleasure in the summer season, is navigable.

SAME—RIGHTS OF STATE—IRRIGATION. The state can make any use of the waters or body of a navigable lake, and confer the rights of irrigation therein.

SAME—RIGHTS OF LITTORAL OWNERS. The erection of dams whereby the waters of a lake collected during the winter season months, are retained in the summer for the purpose of irrigation, but which does not raise the waters above the line of ordinary high water mark, does not give rise to any action for damages, where a sufficient amount of water was not withdrawn in the summer time to lower the line below the line of ordinary low water mark.

SAME—VESTED RIGHTS AS AGAINST STATE. Littoral owners upon a navigable lake, who took title from the government prior to the admission of the state, acquire no vested rights that would interfere with the sovereignty of the state over the waters or the land below ordinary high water mark.

Appeal from a judgment of the superior court for Spokane county Kennan, J., entered December 19, 1904, upon findings in favor of the defendant, after a trial on the merits

[1]Reported in 84 Pac. 395.

before the court without a jury, in an action for an injunction and damages on account of interfering with the waters of a lake. Affirmed.

Robertson, Miller & Rosenhaupt, for appellants, contended, among other things, that the Irrigation Company was a trespasser, and as such could acquire no rights in the water under its appropriation. *Watkins v. Dorris,* 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *Griffith v. Holman,* 23 Wash. 347, 63 Pac. 239, 83 Am. St. 821, 54 L. R. A. 178. Appellants were entitled to protection, as riparian proprietors, against unlawful diminution of the waters of the lake. *Rigney v. Tacoma Light & Water Co.,* 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Benton v. Johncox,* 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107; Angell, Watercourses, § 5; *Lux v. Haggin,* 69 Cal. 255, 10 Pac. 674; *Sturr v. Beck,* 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761; *New Whatcom v. Fairhaven Land Co.,* 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; *Yates v. Milwaukee,* 10 Wall. 497, 19 L. Ed. 984; *Smith v. Rochester,* 92 N. Y. 463, 44 Am. Rep. 393. If the lake is navigable, then, the navigability being interfered with, an injunction should issue on that ground. *Monroe Mill Co. v. Menzel,* 35 Wash. 487, 77 Pac. 813. The proprietor of a pleasure resort on a lake is entitled to relief against the diminution of the water thereof. *Valparaiso City Water Co. v. Dickover,* 17 Ind. App. 233, 46 N. E. 591; *Cedar Lake Hotel Co. v. Cedar Lake Hydraulic Co.,* 79 Wis. 297, 48 N. W. 371.

Allen & Allen, and *Happy & Hindman,* for respondent, contended, *inter alia,* that the state owns the navigable waters within its borders, and the lands thereunder up to and including ordinary high water mark. *Eisenbach v. Hatfield,* 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *Board of Harbor Line Com'rs v. State ex rel. Yesler,* 2 Wash. 530, 27 Pac. 550; *McCue v. Bellingham Bay Water Co.,* 5 Wash. 156, 31 Pac.

461; *Allen v. Forrest,* 8 Wash. 700, 36 Pac. 971, 24 L. R. A. 606; *Morse v. O'Connell,* 7 Wash. 117, 34 Pac. 426; *Mississippi Val. Trust Co. v. Hofius,* 20 Wash. 272, 55 Pac. 54; *Seattle etc. Waterway Co. v. Seattle Dock Co.,* 35 Wash. 503, 77 Pac. 845; *Hinman v. Warren,* 6 Ore. 408; *Pollard v. Hagan,* 3 How. 212, 11 L. Ed. 565; *Barney v. Keokuk,* 94 U. S. 324, 24 L. Ed. 224; *Bowlby v. Shively,* 22 Ore. 410, 30 Pac. 154; *Shively v. Bowlby,* 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; *Goodtitle v. Kibbe,* 9 How. 471, 13 L. Ed. 220; *Doe v. Beebe,* 13 How. 26, 14 L. Ed. 367; *Johnson v. Knott,* 13 Ore. 308, 10 Pac. 418; *St. Louis etc. R. Co. v. Ramsey,* 53 Ark. 314, 22 Am. St. 195, 8 L. R. A. 559; *Niles v. Cedar Point Club,* 85 Fed. 45, 29 C. C. A. 5; *Cooley v. Golden,* 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; *Railway Co. v. Schurmeir,* 7 Wall. 272, 19 L. Ed. 74; *Washougal etc. Transp. Co. v. Dalles etc. Nav. Co.,* 27 Wash. 490, 68 Pac. 74. The Irrigation Company is authorized by the state to appropriate water, the water belonging to the state; and being a grantee from the state, it can appropriate said waters without compensation. *Monongahela Nav. Co. v. Coon,* 6 Pa. St. 379, 47 Am. Dec. 474; *Monongahela Bridge Co. v. Kirk,* 46 Pa. St. 112, 84 Am. Dec. 527; *Board of Wardens v. Philadelphia,* 42 Pa. St. 209; *Pennsylvania R. Co. v. New York etc. R. Co.,* 23 N. J. Eq. 157; *Stevens v. Patterson etc. R. Co.,* 34 N. J. Eq. 532, 3 Am. Rep. 269; *Langdon v. Mayor of New York,* 93 N. Y. 129; *People v. Canal Appraisers,* 33 N. Y. 461; *Roberts v. Baumgarten,* 110 N. Y. 380, 18 N. E. 96; *Kerr v. West Shore R. Co.,* 127 N. Y. 269, 27 N. E. 833; *Connecticut River Lum. Co. v. Olcott Falls Co.,* 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826; *Sage v. New York,* 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. 592, 38 L. R. A. 607; Gould, Waters, §§ 138, 143; Angell, Tide Waters, 80; *Concord Mfg. Co. v. Robertson,* 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679; *Gibson v. United States,* 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996; *Stockton v. Baltimore etc. R. Co.,* 32 Fed. 9; *Hollister v. Union Co.,* 9 Conn. 436,

[illegible] Dec. 36; *Matthiessen etc. Sugar Refining Co. v.* [illegible] *Jersey City*, 26 N. J. Eq. 247; *Hoboken v. Pennsylvania R. Co.*, 124 U. S. 656, 8 Sup. Ct. 643, 31 L. Ed. 543; *Fay v. Salem etc. Aqueduct Co.*, 111 Mass. 27; *State v. Keeper Dam Co.*, 70 N. H. 458, 59 L. R. A. 55; Wood, Nuisances, §§ 458, 472; *Brooks v. Cedar Brook etc. Imp. Co.*, 82 Me. 17, 19 Atl. 87, 17 Am. St. 459, 7 L. R. A. 460; *Gould v. Hudson River R. Co.*, 6 N. Y. 522; *People v. Tibbetts*, 19 N. Y. 523; *Tomlin v. Dubuque etc. R. Co.*, 32 Iowa 106, 7 Am. Rep. 176; *Ingraham, Kenedy & Day v. Chicago etc. R. Co.*, 34 Iowa 249; *Ravenswood v. Flemings*, 22 W. Va. 52, 46 Am. Rep. 433; *Hawkins Point Light-House case*, 39 Fed. 77; *Rundle v. Baltimore etc. R. Co.*, 14 How. 80, 14 L. Ed. 335; *People v. St. Louis*, 5 Gilman 351, 48 Am. Dec. 339; *Com'rs of Homochitt River v. Withers*, 29 Miss. 21, 64 Am. Dec. 127; *Black River Imp. Co. v. La Crosse Boom. etc. Co.*, 54 Wis. 659, 11 N. W. 443, 41 Am. Rep. 66; *Wood v. Fowler*, 26 Kan. 682, 40 Am. Rep. 330; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 18 N. E. 465, 1 L. R. A. 467; *Canal Appraisers v. People*, 17 Wend. 570; *Lansing v. Smith*, 8 Cowen 146; *Hamilton v. Railroad Co.*, 34 La. Ann. 970, 44 Am. Rep. 451; *Escanaba etc. Transp. Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442. The common law riparian right to the water in its natural condition holds except as against the state or its grantees. *Carl v. West Aberdeen Land etc. Co.*, 13 Wash. 616, 43 Pac. 890; *Lownsdale v. Grays Harbor Boom Co.*, 21 Wash. 342, 58 Pac. 663; *Watkinson v. McCoy*, 23 Wash. 372, 63 Pac. 245; *Cohn v. Wausau Boom Co.*, 47 Wis. 314; *Black River Imp. Co. v. La Crosse Boom. etc. Co.*, and *Stevens v. Paterson etc. R. Co.*, *supra*.

ROOT, J.—Appellants are the owners of a leasehold interest in certain lands bordering upon Liberty Lake, a body of water a mile and a half long by three quarters of a mile wide, situated in Spokane county, which lake is much fre-

quented as a pleasure resort. Appellants acquired possession, in October, 1903, under a five year lease of the premises, which extend about a mile along the side of said lake, agreeing to pay a rental of $1,000 per year. It was the purpose of appellants to let bath houses, boats, and otherwise contribute to the demands of pleasure-seekers visiting said lake. There was a sandy beach which made the lake especially desirable for bathing. Appellants expended some $5,000 preparing the resort. The land leased to the appellants was patented by the government in 1889 to one Stephen Liberty, from whom the title descended to the lessors of appellants.

The respondent is the successor in interest to one W. L. Benham, who in 1899 took the necessary legal proceedings to appropriate the waters of said lake for irrigation purposes, claiming said waters to the extent of 200 cubic feet per second. Benham and his successors intended said waters to irrigate a tract of land known as Greenacres, situated about ten miles from Spokane. Some 450 acres are now irrigated thereby and it is claimed that 2,000 acres are capable of being irrigated by means of this water. The company has spent some $50,000 in constructing ditches and improving the lands referred to. It appears that there is no other means of irrigating said lands, and that the same would be practically worthless without this water. The respondent has gates and a dam at the place of intake, by means of which it stores the water during the winter months, and thereby increases the amount at its disposal during the summer months when irrigation is needed. Appellants claim that these gates and dam have the effect of raising the water in the lake beyond its normal condition, and thereby injuring their property, and that in the summer time so much water is withdrawn from the lake that their business is materially interfered with, in that the water is so much lowered that much of the sandy beach cannot be used to advantage by bathers, but they are obliged to go further into the lake

where the bottom is stony and disagreeable to walk upon. Appellants pray that respondent may be enjoined from maintaining or constructing any dam for the purpose of manipulating the waters of said lake, and from in any way interfering with said waters, and ask for damages. The trial in the lower court resulted in a judgment of dismissal in favor of respondent. From this an appeal is taken.

Respondent claims, and the court found, that this lake was navigable. Appellants claimed that in this the court was in error. It was admitted that there was operated upon said lake one steamboat, about forty feet in length, being used for the purpose of carrying visitors and pleasure parties about the lake, but carrying no freight other than small packages. There were numerous small pleasure boats upon the lake, used mostly for rowing and fishing by visitors. The lake had a depth at some places of 35 feet, and it was claimed by appellants that the average depth of water is about 16 feet. Under the former holdings of this court we think the trial court was not in error in adjudging this lake to be navigable. *Madson v. Spokane etc. Water Co.*, 40 Wash. 414, 82 Pac. 718; *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807. This being true, the state would have the right to make such use of the water or of the bed of said lake as to it would seem proper, and could confer upon this respondent the rights of irrigation sought to be exercised by it, due regard being had to the rights of others. Were it made to appear that the dam or gates erected, or about to be constructed, by the respondent had or would raise the water above the ordinary high water line, and to the injury of appellants' property, the court would doubtless furnish relief. *Carl v. West Aberdeen Land etc. Co.*, 13 Wash. 616, 43 Pac. 890; *Sultan Water etc. Co. v. Weyerhauser Timber Co.*, 31 Wash. 558, 72 Pac. 114; *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813.

But in this case the court found, and properly, we think,

that the respondent in retaining the water during the winter months as aforesaid, had not caused the same to raise above the line of ordinary high water mark, and that it had not in the summer time or at any time withdrawn a sufficient amount of water to lower the lake below the line of the ordinary low water mark. These things being true, we think that the respondent has acted within its legal rights and that the appellants have no legal cause of complaint. The latter contended that their grantors, having acquired the property from the government prior to statehood, became endowed with vested rights in and to the use of the waters and shores of said lake upon which their land abutted, and that the constitution and statutes of the state could not curtail those rights. It may be conceded that any vested rights possessed by their grantors and themselves could not be interfered with; but as this is a navigable body of water, the United States government, except for certain purposes in no manner involved here, could not dispose of the land below ordinary high water mark, but would hold said lands for the benefit of the future commonwealth which, upon attaining statehood, would become entitled to sovereignty thereover, and to the control and disposition of the waters, except where disclaimed by section 2, article 17, of the state constitution.

Finding no errors in the judgment of the lower court, the same is affirmed.

MOUNT, C. J., CROW, DUNBAR, HADLEY, and FULLERTON, JJ., concur.

[No. 5959. Decided Feburary 28, 1906.]

CLOYCE D. CONINE, *Respondent*, v. OLYMPIA LOGGING COMPANY, *Appellant*.[1]

MASTER AND SERVANT — NEGLIGENCE — FAILURE TO PROVIDE SAFE METHOD OF DOING BUSINESS — STARTING LOGGING ENGINE WITHOUT WARNING—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained through the negligent starting of a logging engine without giving warning, there is sufficient evidence of negligence to sustain a verdict for the plaintiff, where it appears that the engine used in dragging logs with a cable was not in view of the men attaching the logs, and was about sixty rods distant, and that the defendant failed to supply any appliance by which the engineer could signal to the men that he was about to start the engine excepting by a whistle of the engine, which, on account of the noise of another engine nearby and of the distance, the men could not always hear, that it was customary in the defendant's adopted method of doing business not to start the engine until the men had signaled the engineer, and the plaintiff, while attaching logs in the regular line of his duty, was injured by the starting of the engine without warning, and without having given any signal to the engineer to start the engine (FULLERTON, J., dissenting).

SAME—CONCURRING NEGLIGENCE OF FELLOW SERVANT. In such a case the concurring negligence of the engineer in starting the engine before receiving a signal so to do will not relieve the master from liability.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered June 14, 1905, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained by a logger by reason of the starting of an engine and the tautening of a cable. Affirmed.

G. C. Israel, for appellant.

Phil Skillman and *J. W. Robinson*, for respondent.

HADLEY, J.—This cause was once before appealed to this court, and was reported in 36 Wash. 345, 78 Pac. 932. The former appeal was determined upon demurrer to the com-

[1]Reported in 84 Pac. 407.

plaint, and for a statement of the averments of the complaint we refer to the former opinion. The trial court had sustained the demurrer on the ground that no negligence was charged to the defendant, and that the negligence shown was that of a fellow servant. This court was, however, of the opinion that, as against demurrer, the complaint, because of the particular situation, did charge actionable negligence against defendant, in that it was charged that defendant negligently failed to provide an appliance by which the engineer could signal the man at the logs that he was about to start his engine for the purpose of moving the logs, by means of which the man at the logs would be enabled to protect himself against injury. Accordingly the judgment was reversed, and the cause remanded with instructions to overrule the demurrer. The defendant afterwards answered, and denied the allegations as to negligence. The answer also alleges that the injury was due to plaintiff's contributory negligence, together with the negligence of a fellow servant. The cause was tried before a jury, and a verdict was returned in favor of plaintiff for the sum of $2,000, for which amount judgment was entered, and the defendant has appealed.

It is assigned that the court erred in denying appellant's motion for nonsuit. It is contended that the proof showed that appellant was not negligent in the particular wherein it was held that the complaint charged negligence; but that it appeared that means for signaling from the engine to the man at the logs were provided. The testimony discloses the environment of respondent much as described in the complaint. His situation at the logs was about sixty rods from what was called the "road" engine. This engine was stationed at the side of the railroad track, and was operated to draw the logs from the place where respondent connected them with a cable attachment. They were drawn down to the railroad in this manner for the purpose of being loaded upon the cars. Respondent's location was up a hill from that

of the engineer at the road engine, and the hill and trees intervened so that one could not see from one location to the other.

Close to the place where respondent was required to attach the logs, was stationed another engine, called the "yard" engine. This was used to draw the logs by means of another cable extending back into the woods to points where the logs were cut. When thus drawn out to a point near this engine, it was respondent's duty to attach them to the cable connected with the road engine, for the purpose aforesaid. A wire rope extended from near respondent's location to the road engine, which was attached to the whistle of the latter engine. It was provided in order that respondent might, by pulling it, sound the whistle of the road engine, and thus signal the engineer that the logs were attached and ready to be drawn. The engineer was not expected to start the engine until he received such a signal, which by rule was to be one sound of the whistle. There was no appliance extending from the road engine to respondent's location whereby the engineer could sound a signal near respondent that the engine was about to be started. The signaling means which appellant contends it did provide were that the engineer should give one sound of the whistle at the engine as a notification to respondent that the engine was about to start for the purpose of pulling the logs. This signal was not to be given, and the engine was not to be started, until respondent had first given the signal indicating that all was in readiness.

It will be observed that the place where appellant contends it provided a signal to be sounded for respondent's protection, was sixty rods distant from him, with a hill and trees intervening between him and the place. Moreover, in close priximity to the respondent was the yard engine, which the evidence shows, was in operation at the time of the accident. It was also shown that the running of this engine and the operation of its cable attachment made much noise.

Taking into account all these surroundings, it became a serious question whether respondent, even by the exercise of reasonable care, could at all times hear the signal sounded beyond the trees and down the hill at the road engine, sixty rods away. He says he gave no signal for starting the engine, and that he heard none that it was about to be started. We said in the former opinion that, if signaling means had been provided whereby the engineer could have signaled respondent that the engine was about to start when it did, respondent might thereby have been warned of his danger, and thus enabled to protect himself from injury. It is true, the complaint alleged that no signaling device was provided for that purpose; but if the proof showed that appellant relied upon its engine whistle sixty rods distant from respondent, as furnishing the means for such signal, and that it was insufficient under the surroundings for reasonably safe reliance, then sufficient negligence was shown for the consideration of the jury. The intendment of the averment of the complaint that no means were provided for the enginer to sound a signal at respondent's location was fully shown by respondent's proofs, and if some other means relied upon by appellant to effect such signal purposes did appear in the evidence, it became a question for the jury whether the appliance was sufficient under all the circumstances.

For reasons stated in the former opinion, we think that, under the testimony introduced by respondent, the court should not have held as a matter of law, upon the motion for nonsuit, that the cause came within the fellow servant rule which exempts the master from liability. In the discharge of their particular duties, the two employees were necessarily so situated remote from each other that adequate means of communication from the engineer to respondent were necessary in order that respondent might assuredly receive warning of danger from the movement of logs about to be made. With such adequate warning means provided, respondent might as a result thereof have been enabled to so

control his situation as to escape injury. For appellant to have been held free of negligence in the premises, as a matter of law, it must have clearly appeared that it had provided the two employees, situated as they were, with reference to each other, with sufficient communicating facilities for exercising such immediate influence over each other as was necessary to enable them to reasonably control the situation with respect to safety. In other words, it must have clearly appeared that a safe place was provided by appellant for respondent to do the work he was assigned to do; that his injury was in no sense due to appellant's neglect in that regard, but was wholly due to the neglect of a fellow servant, before the court would have been justified in withholding the case from the jury on the ground that the injury was the result of a fellow servant's negligence. We think that the motion for nonsuit was properly denied.

In any event, whatever may have been the evidence at that time, appellant did not stand upon its motion for nonsuit, but proceeded to introduce evidence in its own behalf. Having thus waived its right to stand upon the motion for nonsuit, it then became necessary to consider the case upon the whole evidence introduced by both parties. *Port Townsend v. Lewis,* 34 Wash. 413, 75 Pac. 982; *Elmendorf v. Golden,* 37 Wash. 664, 80 Pac. 264. Appellant introduced evidence that the engineer did sound the whistle signal before starting. Under appellant's theory and evidence, there was, therefore, no neglect of the fellow servant by way of failing to use the signaling means provided. If, therefore, there was neglect of the fellow servant, it consisted in starting the engine without first receiving a signal from respondent. Respondent says that he heard no starting signal. If, therefore, the starting signal device was insufficient to meet the exigencies of respondent's situation, there was negligence of the master concurring with that of the fellow servant. In such a case, the master is not excused. *Costa v. Pacific Coast Company,* 26 Wash. 138, 66 Pac. 398; *Brabon v.*

Seattle, 29 Wash. 6, 69 Pac. 365. See, also, authorities cited in those opinions.

Appellant assigns as error the refusal of the court to give certain instructions. We think, however, that the instructions given fairly and fully submitted the case to the jury within our views as above set forth, and also in the former opinion. We believe appellant's requests for proper instructions were sufficiently covered by those given, and that its rights were not prejudiced by the refusal to instruct in the exact form requested.

No questions being raised as to the extent of respondent's injury, the amount of damages awarded, or as to the introduction of evidence at the trial, the judgment is therefore affirmed.

MOUNT, C. J., and DUNBAR, J., concur.

CROW and ROOT, JJ., (concurring)—By reason of the rulings heretofore announced in *Conine v. Olympia Logging Co.,* 36 Wash. 345, 78 Pac. 932, which have become the law of this case, we concur in the result.

FULLERTON, J., dissents.

[No. 5913. Decided February 28, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. ALBERT WILSON *et al.*, *Appellants*.[1]

CRIMINAL LAW—LARCENY—VARIANCE—PROOF OF POSSESSION. Upon a prosecution for the larceny of cattle running upon the range, under Bal. Code, § 7114, providing that the possession of such cattle shall throw upon the accused the burden of explaining such possession, evidence that the cattle were found in the defendants' field, marked and branded with their mark and brand, is sufficient proof possession to sustain a conviction under such section; and the fact of the marking and branding, which is a distinct offense under the statute, does not constitute a variance; since the same was competent upon the question of the intention to commit the larceny charged.

TRIAL—INSTRUCTIONS. It is not error to refuse proper instructions covered in the general charge.

NEW TRIAL—JURORS—MISCONDUCT—SUFFICIENCY OF APPLICATION. A new trial on the ground of misconduct of the jury, in that they were influenced to render a verdict of guilty from the fact that there had been an attempt to bribe a number of the jurymen, is properly denied where affidavits in support of the motion contained only hearsay statements as to the fact that the attempt at bribery was communicated to the jury before arriving at their verdict, and where no affidavits of the jurymen were produced, and no excuse given except that defendants' counsel have been unable to find any juror who was willing to make affidavits.

SAME—ATTEMPT AT BRIBING JURY—DISCLAIMER. A motion for a new trial on the ground that an attempt had been made to bribe a juror in the interests of the moving party is properly denied where the moving party does not show by affidavit that he had no knowledge or connection with the attempt at bribery.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered May 25, 1905, upon a trial and conviction of the crime of cattle stealing. Affirmed.

G. C. Israel, for appellants.

Horatio Alling, for respondent.

HADLEY, J.—The defendants in this action were charged jointly with the crime of stealing six head of neat cattle, the

[1]Reported in 84 Pac. 409.

property of one McCorkle, which cattle were at the time running at large upon the public range, in Thurston county. The defendants were jointly tried, and a verdict of guilty returned. A motion for new trial was denied, and judgment was entered by which each of the defendants was sentenced to three years' imprisonment in the state penitentiary. Both defendants appealed, and it is conceded that, after the appeal was perfected, the defendant Currie died. The appeal is therefore considered with reference to appellant Wilson only, and any reference to the two in the discussion will be only because of their joint relations in the cause.

It is assigned that the court erred in refusing appellants' request for an instructed verdict of acquittal at the close of the state's evidence in chief, on the ground that there was a fatal variance between the charge in the information and the proofs submitted. It is pointed out that the prosecution is based upon Bal. Code, § 7113, which provides a penalty for the larceny of neat cattle. The next section, 7114, provides that, when neat cattle are permitted by the owner to run on the range, proof of the possession of such an animal by the person accused of stealing it shall be prima facie evidence that the accused acquired possession thereof recently, and shall have the effect of throwing upon the accused person the burden of explaining such possession. It is argued that, in order to sustain a conviction under the statute upon which the information is predicated, it is incumbent upon the state to show an actual, felonious taking of the cattle by the accused, or the finding of them in his possession, in which latter event the burden is cast upon him to show that the possession was lawfully acquired. It is contended that the proof neither showed a taking of the cattle by the accused, nor that they were found in his possession, but that it tended only to establish an unlawful branding as defined by an entirely different and distinct statute, which is found in Bal. Code, § 7125.

Respondent argues that sufficient proof of possession was

made to place upon appellants the burden of explaining under the statute, and we think the evidence supports the contention. There was evidence to the effect that the cattle were found in appellants' field, and that they were marked and branded with appellants' mark and brand. The fact that they were so marked and branded was a circumstance bearing upon the question of intention to commit the larceny charged, which was proper for the consideration of the jury in that connection, and it did not necessarily show a variance from the charge of larceny because it may have tended to show that appellants were also guilty of another offense defined by statute. We think it was not error to deny the motion for an instructed verdict of acquittal.

Complaint is made that the court refused to give an instruction as requested, to the effect that, even if the jury should find that appellants took the cattle, yet if they should find from the evidence that they did so in an honest belief, although mistaken in that belief, that they had the right or authority to take them, then the verdict should be not guilty. We think the instructions given, bearing upon the question of intent, comprehended every essential idea included in appellants' request. It was therefore not error to refuse the instruction in the form requested.

The chief contention on this appeal is that the court erred in its consideration of the motion for a new trial. The circumstances shown present a somewhat anomalous situation. The motion for new trial charged misconduct of the jury in the way of receiving evidence not introduced at the trial. In support of the motion, affidavits of appellants' counsel were filed, to the following effect: That upon the return of the jury with the verdict, and immediately after the same was read and filed, one of the jurors arose in his place in the jury box and stated to the court as follows: "I want to see Your Honor in secrecy on a matter of greatest importance;" that thereupon court was adjourned, and the judge and the said juror retired to the judge's chambers, where

the two were alone for some time; that after a time the judge called the prosecuting attorney into the room, where the three were together for some time; that the prosecuting attorney then called the other jurors into the judge's chambers, where all the jurors, the judge and the prosecuting attorny remained for some time; that thereafter all the jurors came out of the room; that a juror then stated to one of the counsel that "there was no result until the thing was sprung;" that upon being asked what thing, he replied that he could not tell; that shortly afterwards one Welch was arrested upon the charge of attempting to bribe the jury.

The affidavit of another counsel states, in effect, that he conversed with a number of the jurors, and that from such conversations, and from general information received from hearsay sources, he has reason to believe, and does believe the fact to be, that after the jury retired to consider the verdict, they cast one or more ballots for the purpose of ascertaining the individual views upon the question of guilt or innocence; that such ballots resulted in certain votes in favor of guilt and others in favor of innocence; that while the jurors were in this attitude, and by reason thereof unable to agree as to the guilt or innocence of the accused, one of the jurors stated, in the hearing of the others, that he had been approached during the Sunday adjournment of the trial by one Welch with a proposition to bribe the juror to return a verdict of not guilty; that immediately thereafter, and solely by reason of said statement, all of the jurors who had previously been of the opinion that the accused were not guilty, voted for a verdict of guilty; that such were the facts reported to the judge by the juror and jurors during the above-mentioned interview; that the affiant has been unable to secure any member of the jury who is willing to make an affidavit to the facts above set forth, but that no member of the jury with whom affiant conversed has denied the truth of such facts. The motion for new trial and the affidavit of counsel gave notice that, upon the hearing of

the motion, the judge would be requested to cause to be made a part of the record a statement of all that occurred in his chambers between himself and the jurors at the time of the aforesaid consultation, and furthermore, that the court should permit the jurors to be called to the witness stand and interrogated orally concerning the facts alleged in the affidavits.

At the hearing upon the motion, the court did cause to be made a part of the record the following statement:

"Upon the coming in of the jury after the verdict had been received, the jury polled and discharged, but before the jury left the box, upon the statement of the juror Westover made from the jury box that he desired a private interview with myself as judge of this court, I retired with him into the judge's chambers and he there stated to me that it had been disclosed by three members of the jury while in the jury room that an attempt had been made by one W. M. Welsh to bribe the said three members of the jury; that the proposition submitted to them by the said Welch was in the interest of the said defendants, to wit, that they should hang the said jury, the statement of the said Westover was confirmed by the rest of the members of the said panel, but that no statement was made to me by any member of the jury as to the time when this disclosure was made—as to whether it was before arriving at a verdict or not."

Application was then made to the court on the alleged ground of inability to procure affidavits of jurors, for leave to call to the witness stand members of the jury for the purpose of showing that the statements aforesaid were made in the jury room before the jury had arrived at a verdict. The request was refused.

It will be observed that the statements in the affidavits which were filed were entirely hearsay, and were not of themselves sufficient to establish misconduct of the jury. But in view of the above statement made a part of the record by the court, and of the further statement in the affidavits that counsel had been unable to procure jurors' affidavits, it is urged that the court erred in not permitting jurors to be

called to testify orally that the alleged statements concerning attempted bribery were made in the jury room before the verdict was reached.

Our statute in relation to motions for new trials in criminal cases provides that, when application is made upon the ground here urged, the facts on which it is based shall be set out in an affidavit. Bal. Code, §§ 6965, 6966. It is urged, however, that, notwithstanding the statute, because of the unwillingness of jurors to make affidavits, the court should have resorted to oral testimony in the premises. The case of *Lax v. State* (Tex. Cr.), 79 S. W. 578, is cited. That case included features much like those in the case at bar, and it was held that the court should have forced the attendance of jurors and required them to testify as to what had occurred in the jury room. Reference to the Texas statutes however, discloses the following:

"The state may take issue with the defendant upon the truth of the causes set forth in the motion for a new trial, and in such case the judge shall hear evidence by affidavit or otherwise, and determine the issue." Willson, Texas Crim. Stats., title 9, chap. 1, § 2553, art. 781.

It thus appears that the Texas statute expressly provides that, upon motion for new trial the judge shall hear evidence "by affidavit or otherwise." Our statute is equally explicit that the facts shall be set forth in an affidavit, and no other method of bringing the facts before the court is provided by our statute.

If it should be even conceded that such extreme exigencies might arise in a case as would seem to justify the court in resorting to compulsory process to procure oral testimony of jurors upon a motion for new trial, it should certainly be a case where it clearly appears that the method provided by statute is impossible. Respondent contends that such does not appear in the case at bar, and that the affidavits of counsel do not disclose an exhaustive and diligent effort to pro-

cure the affidavits of jurors so as to produce the evidence as required by our law. The affidavit states the following:

"I have been unable to secure any member of said jury who is willing to make an affidavit to the facts herein set forth, but no member of the said jury that I have conversed with has denied the truth of the facts above set forth."

The affidavit does not state that any juror absolutely refused to make an affidavit, but only that the affiant has been unable to find any one who is *willing* to make it. A juror might not be willing, as a voluntary matter, to make an affidavit, and yet from a sense of duty he might not absolutely decline to do so. Moreover, the affidavits disclose that all the jurors must have had knowledge of the statement alleged to have been made in the jury room, but it is neither shown that all the jurors were requested to make affidavits, nor that they refused to do so. The language of counsel's affidavit indicates that he had conversed with only a portion of the jurors upon the subject. We therefore think it does not sufficiently appear that it was impossible to procure affidavits of jurors and thereby comply with the statutory requirement that, on motion for new trial, "the facts on which it is based shall be set out in an affidavit."

Respondent further urges that the accused should not have been heard to ask for a new trial on the ground of misconduct of the jury, as alleged, until they had at least disclaimed any connection with, or knowledge of, the alleged attempted bribery. The showing made in behalf of accused expressly states that the statement made in the jury room as to attempted bribery charged that it was in the interest of the accused. There is, however, no statement that any such attempted bribery, if there was such, was without the knowledge, consent, authority, or connivance of the accused. The criticized conduct of the jury was directly traceable to the charge that there was an attempted bribery in behalf of the accused, and before the latter should have been permitted to take advantage of such a situation upon motion for new trial, they should at

least have submitted their own sworn statement that they were in no way connected with the alleged facts and circumstances which led to the conduct of the jury. It is generally held that, where prejudice has resulted to an unsuccessful party from the misconduct of the jury, he is entitled to have the verdict set aside, provided he was not concerned in such misconduct. 12 Ency. Plead. & Prac., 549, and cases cited. One must show innocence and want of timely knowledge of the circumstances attending the alleged misconduct to entitle him to relief. *Cogswell v. State,* 49 Ga. 103; *State v. Nash & Barnett,* 45 La. Ann. 1137; *Clough v. State,* 7 Neb. 320. If the complaining party participates in the misconduct, relief by new trial will not be granted. *United States v. Salentine,* 8 Bissell 404. The court in that case made the following pertinent remark:

"As, for example, suppose a juror communicates a willingness to accept a bribe, and the party pays him a bribe, and the bribe proves ineffectual, and there is an adverse verdict, can the party who has thus dealt with the juror ask for the benefit of a new trial, basing his application upon the corrupt act of the juror? As I understand the rule upon this subject, it is enforced for the benefit and protection of those who are themselves innocent of any participation in the misconduct complained of."

To have entitled the accused to relief, the court should, in any event, have had before it their affidavits that they had neither knowledge of, nor connection with, the peculiar circumstances which are alleged to have led to the misconduct.

For the foregoing reasons, we believe the court did not err, and the judgment is affirmed.

MOUNT, C. J., DUNBAR, CROW, and FULLERTON, JJ., concur.

[No. 5919. Decided February 28, 1906.]

ALLEN & GILBERT-RAMAKER COMPANY, *Respondent, v.* CANADIAN PACIFIC RAILWAY COMPANY, *Appellant.*[1]

CARRIERS—OF GOODS—BILL OF LADING. Where the receiving carrier issues a bill of lading for goods to be shipped beyond its line and the consignor delivers the same to an agent of an intermediate carrier who issues a bill of lading upon which the goods were shipped, such intermediate carrier makes itself an original carrier and its bill of lading stands for the contract between the consignor and the carrier.

SAME—LOSS OF GOODS—NEGLIGENCE OF CONNECTING LINE—LIABILITY OF ORIGINAL CARRIER. A common carrier to which goods are consigned and which issues to the shipper an original bill of lading for the carriage of the goods to a point beyond its own line, is responsible for the delivery of the goods and liable for damages thereto after the goods have left its own line.

SAME—BILL OF LADING—CONSTRUCTION—EXEMPTION FROM LIABILITY. A statement printed in fine print in the bill of lading issued by a carrier for the transportation of goods to a point beyond its own line, to the effect that in case of any loss or damage to the property during such transportation the carrier alone shall be held responsible therefor in whose custody the goods might be at the time, does not constitute a contract between the parties exempting the original carrier from responsibility for damages done while in the hands of connecting carriers, especially if such bill of lading is given after the delivery of the goods by the shipper.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 10, 1905, upon findings in favor of the plaintiff, after a trial on the merits, before the court, a jury being waived, in an action for damages to goods shipped. Affirmed.

Thomas B. Hardin and *Norwood W. Brockett,* for appellant, contended, among other things, that a carrier may limit its liability to loss occurring on its own line. *McCarn v. International etc. R. Co.,* 84 Tex. 352, 19 S. W. 547, 31 Am. St. 51, 16 L. R. A. 39; 6 Am. & Eng. Ency. Law

[1]Reported in 84 Pac. 620.

(2d ed.), 639; *Berg v. Atchinson etc. R. Co.*, 30 Kan. 561, 2 Pac. 639; *Rickerson Roller-Mill Co. v. Grand Rapids etc. R. Co.*, 67 Mich. 110, 34 N. W. 269; *Harding v. International Nav. Co.*, 12 Fed. 168; *Ortt v. Minneapolis etc. R. Co.*, 36 Minn. 396, 31 N. W. 519; *McConnell v. Norfolk etc. R. Co.*, 86 Va. 248, 9 S. E. 1006; *Hunter v. Southern Pac. R. Co.*, 76 Tex. 195, 13 S. W. 190; *Myrick v. Michigan etc. R. Co.*, 107 U. S. 102, 1 Sup. Ct. 425, 27 L. Ed. 325; *Hill v. Georgia etc. R. Co.*, 43 S. C. 461, 21 S. E. 337; *Pennsylvania Co. v. Dickson*, 31 Ind. App. 451, 67 N. E. 538; *Galveston etc. R. Co. v. Short* (Tex. Civ. App.), 25 S. W. 142; *Taffe v. Oregon R. Co.*, 41 Ore. 64, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187; *Dimmitt v. Kansas City etc. R. Co.*, 103 Mo. 433, 15 S. W. 761; *Washburn Crosby Co. v. Boston etc. R. Co.*, 180 Mass. 252, 62 N. E. 591; *Courteen v. Kanawha Dispatch*, 110 Wis. 610, 86 N. W. 176, 55 L. R. A. 182; *Tolman v. Abbot*, 78 Wis. 192, 47 N. W. 264; *Keller v. Baltimore etc. R. Co.*, 174 Pa. St. 62, 34 Atl. 455.

Ballinger, Ronald, Battle & Tennant for respondent, contended, *inter alia*, that the acceptance of the goods, in the absence of an express contract, implies an undertaking to transport them to their destination beyond the carrier's own line. *Falvey v. Georgia Railroad*, 76 Ga. 597; *Atlanta etc. R. Co. v. Texas Grate Co.*, 81 Ga. 602, 9 S. E. 600; *Mobile etc. R. Co. v. Copeland*, 63 Ala. 219, 35 Am. Rep. 13; *Louisville etc. R. Co. v. Meyer*, 78 Ala. 597; *Hansen v. Flint etc. R. Co.*, 73 Wis. 346, 41 N. W. 529, 9 Am. St. 791; *Pereira v. Central Pac. R. Co.*, 66 Cal. 92, 4 Pac. 988; *Halliday v. St. Louis etc. R. Co.*, 74 Mo. 159, 41 Am. Rep. 309; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Adams Express Co. v. Wilson*, 81 Ill. 339; *Wabash etc. R. Co. v. Jaggerman*, 115 Ill. 407, 4 N. E. 641; *Baltimore R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617; *Carter & Hough v. Peck*, 4 Sneed 203, 67 Am. Dec. 604; *Western*

etc. R. Co. v. McElwee, 6 Heisk. 208; *East Tennessee etc. R. Co. v. Rogers & Hartsell,* 6 Heisk. 143, 19 Am. Rep. 589; *Louisville etc. R. Co. v. Campbell,* 7 Heisk. 253; *Angle & Co. v. Mississippi etc. R. Co.,* 9 Iowa 487; *Mulligan v. Illinois etc. R. Co.,* 36 Iowa 181, 14 Am. Rep. 514; *Weed & Weed v. Saratoga etc. R. Co.,* 19 Wend. 534; *Bradford v. South Carolina R. Co.,* 7 Rich. (S. C.) 201; *Kyle v. Laurens R. Co.,* 10 Rich. (S. C.) 382; *Nashua Lock Co. v. Worcester etc. R. Co.,* 48 N. H. 339. Payment of full freight constitutes a contract to carry to the destination. *Davis v. Jacksonville etc. Line,* 126 Mo. 69, 28 S. W. 965; *Lin v. Terre Haute R. Co.,* 10 Mo. App. 125; *Fisher v. Merchants' Dispatch Transp. Co.,* 13 Mo. App. 133; *Baltimore Steamboat Co. v. Brown* 54 Pa. 77; *Jennings v. Grand Trunk R. Co.,* 127 N. Y. 438, 28 N. E. 394; *Hill Mfg. Co. v. Boston etc. R. Co.,* 104 Mass. 122, 6 Am. Rep. 202; *Perkins v. Portland etc. R. Co.,* 47 Me. 573, 74 Am. Dec. 507; *Nashua Lock Co. v. Worcester etc. R. Co.,* and *Illinois etc. R. Co. v. Frankenberg, supra.* The following are simlar cases in point. Hutchinson, Carriers, § 158; *Eckles v. Missouri Pac. R. Co.* (Mo. App.), 87 S. W. 99; *Germain Fruit Co. v. California etc. R. Co.,* 133 Cal. 426, 65 Pac. 948; *Colfax Mountain Fruit Co. v. Southern Pac. R. Co.,* 118 Cal. 648, 50 Pac. 775. See, also, *Harp v. The Grand Era,* Fed. Cas. No. 6,084; *Baltimore etc. R. Co. v. Wilkens,* 44 Md. 11, 22 Am. Rep. 26; *Wyman v. Chicago etc. R. Co.,* 4 Mo. App. 35; *Cincinnati etc. R. Co. v. Spratt,* 2 Duval (Ky.) 4; *Block v. Fitchberg etc. R. Co.,* 139 Mass. 308; *Hart v. Rensselaer etc. R. Co.,* 8 N. Y. 37, 59 Am. Dec. 447; *Carter & Hough v. Peck,* 4 Sneed 203, 67 Am. Dec. 604; *Gulf etc. R. Co. v. Lewine* (Tex. Civ. App.), 29 S. W. 835; *Norfolk etc. R. Co. v. Read,* 87 Va. 185; *Cummins v. Dayton etc. R. Co.,* 9 Am. & Eng. R. R. Cases, 36; *Wahl v. Holt,* 26 Wis. 703; *Cutts v. Brainerd,* 42 Vt. 566, 1 Am. Rep. 353; *Page v. Chicago etc. R. Co.,* 7 S. D. 297.

DUNBAR, J.—The judgment appealed from is for $500 and costs, in favor of the plaintiff and against defendant, for damages to pianos shipped from New York to Seattle, in the transportation of which defendant was an intermediate carrier. The car in which the pianos were shipped was delivered to, and accepted and sealed by, the New York, New Haven & Hartford Railroad Company, which issued and delivered to Ludwig & Company its bill of lading. Ludwig & Company, the consignors, delivered the bill of lading of the New York, New Haven & Hartford Railroad Company to the agent of the defendant, the Canadian Pacific Railroad Company, and received a new bill of lading or receipt from the defendant. The other intermediate companies were the New York Central & Hudson River Railway Company and the Northern Pacific Railway Company. The end of the defendant's line was at Sumas in Washington. When the car reached there, it was turned over to the Northern Pacific Railway Company, which carried it to its destination at Seattle.

The cause was tried by the court, a jury having been waived. The court, among other things, found, that the plaintiff had purchased from Ludwig & Company's manufactory, in New York, the pianos in question; that Ludwig & Company had shipped them to the plaintiff at Seattle; that the New York, New Haven & Hartford Railroad Company issued to Ludwig & Company a bill of lading for said pianos; that thereupon Ludwig & Company delivered the original bill of lading to the duly authorized agent of the defendant in New York, who thereupon issued and delivered to said Ludwig & Company a bill of lading, upon which the goods were shipped; found that the goods were damaged in transit through the negligence of the defendant, and that the plaintiff was entitled to the judgment obtained. Exceptions were taken to the findings of fact, but an examination of the record convinces us that they were justified.

The only question which it is necessary to discuss in this

case is a legal one, viz.: What is the responsibility of the defendant company where goods were shipped under the circumstances under which these goods were shipped, the goods passing over the lines of different companies and being injured in transit? The court in this case found that it was not possible to determine on what particular line the damage occurred. We will consider the case as though the defendant here were the original company to which the goods were consigned, which it made itself, we think, by issuing the bill of lading or receipt, which stands for the contract between the shipper and the common carrier.

Was the defendant responsible to the shippers for damages done to their goods beyond the termination of its own lines? It may be conceded, we think, that a carrier is under no common law obligation to transport goods beyond its own line, and it may also be conceded that it cannot exempt itself from liability for its own negligence on its own line. The contention of the appellant here is two-fold, (1) that the carrier did not assume to ship the goods beyond its own lines, and (2) that it did by express stipulation exempt itself from liability; while the contention of the respondent is that the case at bar is one where, by special contract, the defendant assumed the duty of transporting the pianos from New York to Seattle, and that, having done so, by mere provisions inserted in its receipt or bill of lading, it cannot limit its common law liability to a particular part of such through route; that when, by special contract, it undertakes to transport freight throughout the whole route to points beyond its own line, the law for the time being makes the whole line its line, and imposes upon it the duty of transporting its freight to its destination; that other connecting carriers for the purpose of that transportation become its agents, and that it cannot limit its common law liability to any particular portion or link of that through line.

On this subject of responsibility of transportation companies, there is a wilderness of conflicting authority, some

courts holding that, in the absence of a special contract, it will not be presumed that the carrier attempts to deliver the goods beyond the terminus of its own line; others, that the fact of the acceptance of the goods by the carrier and the issuance of a receipt or bill of lading implies a contract to safely deliver to destination mentioned in the bill of lading. This is the universal rule in England, and was laid down in the celebrated case of *Muschamp v. Lancaster etc. R. Co.*, 8 M. & W. 421, and has been adhered to uniformly by the English courts ever since. In that case a parcel was delivered at Lancaster, to the Lancaster & Preston Junction Railway Company, directed to a person at a place in Derbyshire. The Lancaster & Preston Junction Railway Company was known to be proprietor of the line only as far as Preston, where the railway united with the North Union line, and that afterwards with another, and so on into Derbyshire. The parcel having been lost after it was forwarded from Preston, it was held that the Lancaster & Preston Railway Company was liable for its loss. In speaking of the instruction that had been made by the lower court, and which was the alleged error in the case, viz., that the jury might infer the contract to deliver at the end of the route, that the goods had been recived and a receipt given therefor, Lord Abinger said:

"I hardly think they would be likely to infer so elaborate a contract as that which the defendants' counsel suggest, namely, that as the line of the defendants' railway terminates at Preston, it is to be presumed that the plaintiff, who intrusted the goods to them, made it part of his bargain that they should employ for him a fresh agent both at that place and at every subsequent change of railway or conveyance, and on each shifting of the goods give such a document to the new agent as should render him responsible. . . . Besides, the carriage-money being in this case one undivided sum, rather supports the inference that although these carriers carry only a certain distance with their own vehicles, they make subordinate contracts with the other carriers, and are partners *inter se* as to the carriage-money; a fact of which the owner of the goods could know nothing, as he only pays

the one entire sum at the end of the journey. . . . It is better that those who undertake the carriage of parcels, for their mutual benefit, should arrange matters of this kind *inter se,* and should be taken each to have made the others their agents to carry forward."

It is asserted by the appellant in its reply brief that the cases cited by the respondent do not sustain the contention made by the respondent that, while the carrier owes no duty to the shipper to carry goods marked to a destination beyond its own line, yet when it does so undertake, it is prohibited by law from stipulating in its contract that it shall be liable only for its own negligence. An examination of these cases assures us, however, that while many of them are decided on the particular facts in the case, many of them do in principle sustain respondent's contention, and announce their adherence to the rule laid down in *Muschamp's* case; and many more are cited by Hutchinson on Carriers, pp. 168, 169. So that it will not be necessary to reproduce them here. That author also states that, upon the question of the justice and policy of this rule, the American courts are divided; that a number of them have emphatically approved and adopted it, while in a majority of the states the rule has been denied. But it seems to us, as a matter of first impression, that the rule is a wise and equitable one, and necessary for the protection of rights, without depriving the carrier of any rights or of any legitimate defense. If it should be held that the shipper could recover only against the carrier on whose line the damage was actually done, it can readily be seen that in many instances he would be deprived of his remedy altogether; for, as is found by the court in this case, in a majority of cases it would probably be impossible for him to establish the time at which the damage complained of was engendered. It would also be impracticable for him to make special contracts with all the different transportation lines. These companies enter into these traffic arrangements with each other for their mutual benefit, and may enter into them with agreements as

to the protection of their separate interests by inspection, surveillance, or otherwise, while surveillance or care of the goods by the owner would be impossible.

Some of the difficulties besetting the contention of non-responsibility are noticed by the supreme court of New Hampshire, in *Nashua Lock Co. v. Worcester etc. R. Co.*, 48 N. H. 339, where all the leading authorities are collated and reviewed. Among other things it is said:

"The use of steam in carrying goods and passengers has produced a great revolution in the whole business. The amount and importance of it have of late vastly increased and are every day increasing. The large business between different parts of the country is done, as in this case, by parties who are associated in long continuous lines, receiving one fare through and dividing it among themselves by mutual agreement. They act together for all practical purposes so far as their own interests are concerned as one united and joint association. In managing and controlling the business on their lines they have all the advantages that could be derived from a legal partnership. They make such an arrangement among themselves as they see fit for sharing the losses, as they do the profits that happen in any part of their route. If by their agreement each party to the connected line is to make good the losses that happen in his part of the route, the associated carriers, and not the owner of the goods, have the means of ascertaining where the losses have happened. And if this cannot be known, there is nothing unreasonable or inconvenient in their sharing the loss, as in case of a legal partnership, in proportion to their respective interests in the whole route. They undertake the business of common carriers, and must be understood to assume the legal liabilities of that business. They transact the business under a change of circumstances; but the principles and the general policy of the common law, which, as an elementary maxim, holds the common carrier liable for all accidental losses, must be applied to these new methods of transacting the same business; and there is certainly nothing in the present condition of the business which calls for any relaxation of the old rule. The great value of commodities transported over these connected lines; the increased risk of loss and damage from the

immense distances over which they carry goods; the fact that where goods are once entrusted to carriers on these long routes they are placed beyond all control and supervision of the owner are cogent reasons for holding those who associate in these connected lines, to a rule that shall give effectual and convenient remedy to the owner, whose goods have been lost or damaged in any part of the line. Any rule which should have the effect to defeat or embarrass the owner's remedy, would be in direct conflict with the principles and whole policy of the common law."

And much more to the same effect is said by this court. In fact, it seems to us that to deny this right to the shipper would be equivalent to a denial of justice at the hands of the law. The money is paid in one lump sum. The equitable distribution of this money is not within the province of the shipper. He has no way of ascertaining what the contract is between the different connecting lines in relation to their recompense or responsibility, and if his goods are lost or damaged he is relegated to a search across the continent to obtain information as to the responsibility of the different carriers for the damage, information which, in many cases, would be entirely unavailable. He has no way of accompanying the goods to look after them himself; probably would not be allowed to do so, under the transportation rules of the different companies, if he were so inclined. He deals with one company, which accepts his goods, receipts him for the same, and contracts to carry them to their destination; and any rule which would throw upon him the difficulties we have suggested would be unnecessary and inequitable.

It is contended, however, by the appellant that there is a special contract in this case, by which the defendant has exempted itself from liability; that by the bill of lading itself it is stipulated, "in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that the company alone shall be held answerable therefor in whose custody the

same may be at the time of the happening of such loss, detriment, or damage." Even conceding, without deciding, that these conditions are reasonable and could be enforced if agreed to, they are in very fine type, almost impossible for any one not accustomed to them to read, and frequently, as in this case, made more illegible by the use of stamps which cover large parts of the printed matter; and without deciding whether or not the carrier, having made the other connecting carriers its agents in handling the goods which it started, would be bound by the action of such agents and could not, therefore, escape the common law liability which attaches to carriers, we think that this and similar expressions or announcements in bills of lading and receipts, etc., can in no wise be said to be contracts which bind parties to business transactions. Many of the cases, which take the view that carriers under the circumstances of this case can exempt themselves from liability by contracts, hold that such statements made by the carrier do not constitute a contract; especially statements made on bills of lading that are frequently not handed to the shipper until the transaction is completed as far as he is concerned and the goods shipped. In laying down the text, on page 642, 6 Am. & Eng. Ency. Law (2d ed.), the author says:

"It is therefore of no effect where it is brought to the knowledge of the shipper after the goods have been shipped and it is too late for him to recede, as where it is contained in a bill of lading handed to the shipper after the goods have left."

There is by some courts held to be a distinction between the right of a carrier to exempt itself from liability beyond the line of its road absolutely, and the right to an exemption from its negligence. On page 643, 6 Am. & Eng. Ency. Law (2d ed.), it is said:

"Where the carrier undertakes, either expressly, or, as is the rule in some jurisdictions, impliedly by accepting the goods marked to a point beyond its line, to carry the goods

over the entire route although the point of destination is beyond the terminus of its line, it is said that it cannot contract for an absolute exemption from liability for losses not occurring on its own line; that in such a case it can only limit its common-law liability as insurer, and remains liable for any loss caused by negligence, even on a connecting line."

It would seem to us that there might be some reason in this distinction. Supporting this view is cited, *Galveston etc. R. Co. v. Allison,* 59 Tex. 193; *Halliday v. St. Louis etc. R. Co.,* 74 Mo. 159; 41 Am. Rep. 309; *Cincinnati etc. R. Co. v. Pontius,* 19 Ohio St. 221; *Condict v. Grand Trunk R. Co.,* 54 N. Y. 500; and several cases from the Dominion of Canada.

On the whole case, we think no error was committed by the lower court, and the judgment is affirmed.

MOUNT, C. J., ROOT, CROW, FULLERTON, and HADLEY,

[No. 5939. Decided March 1, 1906.]

JOSEPH IMESON *et al., Appellants,* v. THE TACOMA RAILWAY AND POWER COMPANY, *Respondent.*[1]

NEGLIGENCE — DESTRUCTION OF MILL BY FIRE — ORIGIN — FALL OF TROLLEY WIRE—EVIDENCE—SUFFICIENCY—NONSUIT. In an action to recover for the destruction of a mill by fire alleged to have originated from the falling of an electric trolley wire, there is no sufficient evidence as to the origin of the fire, and a nonsuit is proper, where it appears from the testimony of the plaintiff that he discovered the fire shortly after it started, and immediately crossed the railroad track where the wire was afterwards found upon the ground burning everything with which it came in contact, with a loud crackling noise, and it would have been impossible for the plaintiff to have passed the wire if it had been down at the time without having noticed it, and where the only evidence tracing the origin of the fire to the falling wire was circumstantial.

[1]Reported in 84 Pac. 624.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered May 17, 1905, in favor of the defendant upon granting a nonsuit, after a trial before the court without a jury, in an action to recover damages for the destruction of a mill by fire. Affirmed.

John B. Van Dyke, for appellants.

B. S. Grosscup, A. G. Avery, and *S. J. Pritchard,* for respondent.

FULLERTON, J.—In 1904 the appellant Imeson owned and operated a shingle mill at Midland, in Pierce county. The respondent, at the same time, owned and operated an electric railway, the main line of which passed through Midland some one hundred feet north of the appellants's mill. From this main line a spur had been constructed over to a point some ten feet east of the northeast corner of the mill. The railway of the respondent, together with this spur, was equipped in the manner electric railways are usually equipped, and had a trolley wire suspended over its tracks to carry the electric current which furnished the motive power. The mill was burned on the night of June 2, 1904. It was Imeson's conception that the fire was caused by the falling of the trolley wire which had been suspended over the spur track, and in making his claim to the insurance company in which he had the property insured he gave this as his belief as to the origin of the fire. On paying the loss the insurance company took a subrogation receipt, and this action is prosecuted by Imeson and the insurance company jointly, to recover the loss suffered. The case was tried below without a jury, and ended in a judgment of nonsuit at the conclusion of the plaintiffs' case. This appeal is from that judgment.

Two questions are presented by the record, namely: did the falling of the trolley wire start the fire, and if so, did it fall because of the negligence of the respondent? The conclusion

we have reached on the first question makes it unnecessary to investigate the second. That the fire was not started by the trolley wire, it seems to us is a necessary deduction from Imeson's testimony. He was acting as watchman on the night of the fire. He testifies that shortly before ten o'clock of that night he, in company with two other men, made the rounds of the mill, and returned to his cabin, which was some eighty feet distant northerly from the mill; that the men then went to their homes, while he went into his cabin; that about twenty minutes later he stepped out of his cabin to take another look, and had advanced some twenty feet towards the mill when he discovered a fire near its northeast corner. The blaze, he says, was about three feet high, was burning in highly inflamable material, and had evidently just started; that he went at once to the back of the mill for the purpose of starting the pumps, and in doing so crossed the spur track directly in front of the mill and at a place where the trolley wire was afterwards found on the ground. He did not see the trolley wire. It was discovered lying across the path he took some minutes later by other persons who came to the fire, who described it as writhing and twisting on the ground, burning everything with which it came in contract, and making a crackling noise not unlike the sound of firecrackers; in fact, it appeared so dangerous that it was considered unsafe even to throw a stream of water on the fire until it was gotten out of the way. It hardly seems possible that Imeson could have passed over the wire and not have noticed it—in fact he admits as much himself—yet he must have passed over it if it was down at that time. On the other hand, if it was not down at that time it could not have been the origin of the fire. The fact that he did not discover it has, to our mind, almost the force of positive evidence that it was not down, and could not, for that reason, have been the origin of the fire.

The evidence supporting the appellants' view, moreover, is wholly circumstantial. It rests chiefly on the fact that the

wire was discovered to be down so soon after the fire started, and evidence tending to show that it had been insecurely fastened in place originally, and had been recently subjected to severe strains. This would have been more potent had it been shown that there was no other source from which the fire could have originated. But this was a steam mill having its furnaces and engines in the mill proper, and on that day the furnaces had been fired for some special purpose, although the mill seems not to have been in active operation.

Therefore, without specially reviewing the evidence, we are of the opinion that it was insufficient to make a *prima facie* case against the respondent. It was incumbent on the appellants to prove their case with reasonable certainty, and it was not doing this to show a cause from which the fire might have originated, without showing further that it could have originated from no other cause, or that it was more probable that it originated from the cause shown than from any other.

The judgment is affirmed.

MOUNT, C. J., HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 6080. Decided March 1, 1906.]

F. E. CREECH *et al., Respondents,* v. THE CITY OF ABERDEEN, *Appellant.*[1]

APPEAL—DISMISSAL—ORAL NOTICE—ENTRY. Where oral notice of appeal is given in open court the fact that the clerk entered the same in the minute book instead of in the journal, as required by Bal. Code, § 6503, is not ground for the dismissal of the appeal.

APPEAL—ORAL NOTICE—DENIAL OF NEW TRIAL. Where a motion for a new trial is seasonably made before the entry of judgment, oral notice of appeal may be given at the time of overruling the motion for a new trial, although judgment was entered in the meantime, and such notice is effectual as an appeal from the judgment.

1Reported in 84 Pac. 623.

Motion to dismiss an appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 19, 1905. Denied.

R. E. Taggart and *Ben Sheeks,* for appellant.

W. H. Abel and *John C. Hogan,* for respondents.

ROOT, J.—This cause was tried below before the court and a jury, and resulted in a verdict favorable to respondents. This verdict was filed October 14, 1905. On October 16, appellant filed and served a motion for a new trial. On October 19, a judgment was signed by the judge, and entered. On October 20, notice of the taking of the judgment was served and filed. On October 23, the motion for new trial was by the court denied. At the time of this ruling, the appellant, in open court, gave notice of appeal to this court. The minutes of the court for that day show the following entry:

"5931. F. E. Creech et al v. City of Aberdeen.
"Order denying motion for new trial signed, whereupon defendant gave notice, by announcement in open court, of appeal to the supreme court of Washington. . . .
"E. A. Philbrick, Clerk."

The respondents move to dismiss this appeal, assigning as reasons, that the order attempted to be appealed from is not appealable, and that no proper notice of appeal was given. They urge in support of their motion the following points: (1) That the recording of appellant's announcement of appeal in the minute book by the clerk, instead of in the court's journal, was ineffectual to perfect an appeal; (2) that the order denying a new trial was not an appealable order, and that the attempted appeal from it was a nullity; (3) "that the announcement in open court of an appeal from the order denying new trial, made at the time of the entry of such order, was ineffectual as an appeal from the judgment entered some four days previously." Bal. Code, § 6503, provides that a party may give a notice of appeal in open court, and "thereupon the court or judge shall direct the clerk to make

an entry of such notice in the journal of the court." Section 4722 provides for the keeping of an "order book or journal," in which the clerk shall record the "daily proceedings of the court, enter all verdicts, orders, judgments and decisions." The fact that the clerk entered in the minute book, instead of the journal, appellant's announcement of its intention to appeal should not be permitted to defeat the appeal. If the minute book is not, in contemplation of law, the same as the journal provided for by the statute, then the action of the clerk in entering this announcement in the minute book instead of the journal was an error on his part, and one for which we do not think appellant should be held responsible, especially as we are unable to perceive that respondents have been in any way prejudiced thereby.

The second and third points argued cannot be maintained. The statute, as aforesaid, provides that a notice of appeal may be given in open court at the time when such judgment or order is rendered or made. Subsequent to the enactment of this statute, the legislature provided by statute that, upon the return and filing of the verdict of a jury, a judgment might be at once entered thereupon, by the clerk of the court, execution to be held in abeyance in case of the interposition of a motion for a new trial, until the disposition of said motion. According to the record before us, it appears that judgment in this case was signed and entered by the court while the motion for new trial was pending undetermined. Our attention is not called to any statute providing for such a practice. The motion for new trial was served and filed within time. As to whether the judgment should remain effective depended upon the action of the court with reference to said motion. The judgment could become absolute only upon the denial by the court of the motion for a new trial. Keeping in mind the purposes to be served by the various provisions of the statutes referred to, we can see no reason why the giving of a notice of appeal orally in open court, at the time of the denial of the motion for a new trial, should not be deemed a

substantial compliance with the requirements of the statute. It could occasion no delay, because the appellant would have a considerable period of time thereafter within which to take appeal by giving written notice. It would cause no confusion or misapprehension, nor in any way impair the rights of the respondents. Unless we should hold in this manner, it would be incumbent upon us to hold that the statute permitting the entry of judgment upon the filing of the verdict had practically the effect of repealing the statue authorizing the giving of oral notice of appeal in open court, as the defeated party, on the entry of verdict and judgment immediately thereupon, could not at that time interpose such oral notice of appeal without seeming to waive his right to a motion for a new trial, which might be, and often is, a valuable right.

The motion to dismiss the appeal is denied.

MOUNT, C. J., CROW, DUNBAR, FULLERTON, and HADLEY, JJ., concur.

[No. 5545. Decided March 1, 1906.]

EDGAR AMES, *Respondent*, v. GEORGE KINNEAR *et al.*, *Appellants*.[1]

PLEADING—DEMURRER. A general demurrer does not raise the question of improper joinder of causes of action since Bal. Code, § 4977, makes improper joinder a special ground of demurrer.

SUBSCRIPTION—ACTION TO ENFORCE—FAILURE OF CONSIDERATION—PLEADING—ANSWER—SUFFICIENCY. In an action to enforce the terms of a subsidy agreement, termed a "deed," for the conveyance of a half interest in certain tide lands, to be acquired from the state, which agreement shows on its face that it was received as full payment for a subsidy subscription, the full terms of which do not appear, the defendants have a right to show the terms of the subscription and a failure of consideration therefor; and the answer states a complete defense, and it is error to sustain a demurrer thereto, where it is alleged that the agreement was made in sole

1Reported in 84 Pac. 629.

consideration of an agreement of the grantee to construct a certain ship canal, represented by the grantee to be of great value to the owners, and that, although seven years had elapsed, no part of the canal had been constructed, and no consideration had been received by the defendants for the subsidy agreement.

Appeal from a judgment of the superior court for King county, Irwin, J., entered November 16, 1904, upon findings in favor of the plaintiff, after sustaining a demurrer to an affirmative answer and a trial before the court without a jury, in an action for the specific performance of a subscription. Reversed.

James M. Epler and *Charles A. Kinnear,* for appellants, contended, among other things, that if the promisor in a contract does not receive the consideration he has bargained for, then there is no enforcible agreement. *Sorrells v. McHenry,* 38 Ark. 127; *Powell & Co. v. Subers & Massey,* 67 Ga. 448; *Morrow v. Hanson,* 9 Ga. 398, 54 Am. Dec. 346; *Jones v. Buffum,* 50 Ill. 277; *State ex rel. Pettijohn v. Illyers,* 87 Ind. 405; *Jones v. Hathaway,* 77 Ind. 14; *Snyder v. Kurtz,* 61 Iowa 593, 16 N. W. 722; *Simpson Centenary College v. Bryan,* 50 Iowa 293; *Thompson v. Wheeler etc. Mfg. Co.,* 29 Kan. 476; *Dodge v. Oatis,* 27 Kan. 762; *Hopkins v. Hinkley,* 61 Md. 584; *Hodgkins v. Moulton,* 100 Mass. 309; *Rice v. Goddard,* 14 Pick. 293; *Gibson v. Pelkie,* 37 Mich. 380; *Brown v. Weldon,* 99 Mo. 564, 13 S. W. 342; *Westervelt v. Fuller Mfg. Co.,* 13 Daly (N. Y.) 352; *House v. Kendall,* 55 Tex. 40. It is held as a defense in case of failure of the title to land sold. *Hall v. McArthur,* 82 Ga. 572, 9 S. E. 534; *Anderson v. Armstead,* 69 Ill. 452; *Sunderland v. Bell,* 39 Kan. 663; *Julian v. Beal,* 26 Ind. 220, 89 Am. Dec. 460; *Bair v. Laevison,* 91 Ky. 204, 15 S. W. 252; *Lapene & Ferre v. Delaprote,* 27 La. Ann. 252; *Curtis v. Clark,* 133 Mass. 509; *Redding v. Lamb,* 81 Mich. 318, 45 N. W. 997; *Catlett v. Bacon* 33 Miss. 269; *Burns v. Hayden,*

24 Mo. 215; *Frisbee v. Hoffnagle*, 11 Johns. 50; *Ferguson's Admr's v. Teel*, 82 Va. 690; *West v. Shaw's Adm'r*, 32 W. Va. 195, 9 S. E. 81. So in case of failure of title to chattels. *Tobey v. Warsham Bank*, 13 Met. 440; *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 137, 43 N. E. 422. Even in that part of the consideration which was concurrent acts, a tender of the consideration was necessary to be alleged and proven. *Heine v. Treadwell*, 72 Cal. 217, 13 Pac. 503; *Englander v. Rogers*, 41 Cal. 420; *Vankirk v. Talbot*, 4 Blackf. (Ind.) 367; *Swan v. Drury*, 22 Pick. 485; *Hunt v. Livermore*, 5 Pick. 395; *Howland v. Leach*, 11 Pick. 151; *Kane v. Hood*, 13 Pick. 281; *Dana v. King*, 2 Pick. 155; *Morrison v. Ives*, 4 S. & M. (Miss.) 652; *Harvey v. Trenchard*, 6 N. J. L. 152; *Johnson v. Applegate*, 1 N. J. L. 271; *Ackley v. Richman*, 10 N. J. L. 361; *Jones v. Gardner*, 10 Johns. 266; *Gazley v. Price*, 16 Johns. 267; *Parker v. Parmele*, 20 Johns. 136; *Johnson v. Wygant*, 11 Wend. 49; *Payne v. Lansing*, 2 Wend. 525; *Lester v. Jewett*, 11 N. Y. 453; *Campbell v. Gittings*, 19 Ohio 347; *Adams v. Williams*, 2 W. & S. (Pa.) 227. The English authorities are to the same effect. *Phillips v. Fielding*, 2 H. Bl. 123; *Collins v. Gibbs*, 2 Burr 899. The payment of half the expenses of obtaining title to the lands was a condition precedent, the fulfillment of which it was incumbent upon the respondent to allege and prove. *Jones v. Sommerville*, 1 Port. (Ala.) 437; *Flouss & Kennedy v. Eureka Co.*, 80 Ala. 30; *Griel v. Solomon*, 82 Ala. 85, 2 South. 322, 60 Am. Rep. 733; *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867; *Dennis v. Strassburger*, 89 Cal. 583, 26 Pac. 1070; *Gibbons v. Scott*, 15 Cal. 284; *Armor v. Fisk*, 1 Colo. 148; *Chtney v. Barber*, 1 Colo. 256; *Sanford v. Cloud*, 17 Fla. 532; *Griswold v. Scott*, 13 Ga. 210; *Henderson v. Wheaton*, 139 Ill. 581, 28 N. E. 1100; *Myers v. Cicott*, 5 Blackf. (Ind.) 225; *Armstrong v. Rockwood*, 53 Ind. 506; *Skehan v. Rummel*, 124 Ind. 347, 24 N. E. 1089; *Melton v. Coffelt*, 59 Ind. 310; *Hicks v. Zion*, 58 Ind. 548; *Hunter v. Miller*, 6 B. Mon. 612; *Louisville v. Muldoon*,

94 Ky. 462, 22 S. W. 847, *Chamberlin v. McCallister,* 6 Dana (Ky.) 352; *Escott & Son v. White,* 10 Bush (Ky.) 169; *Codding v. Mansfield,* 7 Gray 272; *Turner v. Mellier,* 59 Mo. 526; *Sweezy v. Omaha Hotel,* 5 Neb. 75; *Hugg v. Collins,* 18 N. J. L. 294; *Bogardus v. New York Life Ins. Co.,* 101 N. Y. 328, 4 N. E. 522; *Pope v. Terre Haute Car etc. Co.,* 107 N. Y. 61, 13 N. E. 592; *Wilder v. Little,* Wright (Ohio) 388; *Wilson v. Lyle,* 23 W. N. C. (Pa.) 309, 16 Atl. 861.

Sachs & Hale, for respondent, contended, *inter alia,* that the exceptions to the findings of fact and conclusions of law were insufficient and that the statement of facts should be stricken. *Peters v. Lewis,* 33 Wash. 617, 74 Pac. 815; *Schlotfeldt v. Bull,* 17 Wash. 6, 48 Pac. 343; *Lilly v. Eklund,* 37 Wash. 532, 79 Pac. 1107; *Washington Liquor Co. v. Northwestern Live Stock Co.,* 18 Wash. 71; *Payette v. Willis,* 23 Wash. 299, 63 Pac. 254. An agreement to do a thing is a sufficient consideration to support a deed, even though, as a matter of fact, the agreement is never performed. 2 Devlin, Deeds, § 809; 6 Am. & Eng. Ency. Law (2d ed.), p. 796, and note; *Lake v. Gray,* 35 Iowa 459; *Feeney v. Howard,* 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826; *Gage v. Lewis,* 68 Ill. 604; *Gardner v. Lightfoot,* 71 Iowa 577, 32 N. W. 510; *Gray v. Lake,* 48 Iowa 505. The parties to a deed and their successors in interest are bound by the recitals in the deed and by such recitals only. 2 Herman, Estoppel, §§ 573-577, 606; 2 Devlin, Deeds, § 997.

HADLEY, J.—This action involves a controversy over certain tide lands, situate near the head of Elliott bay. The facts alleged in the complaint necessary to be stated here are substantially as follows: On the 25th day of April, 1895, the defendants, together with one D. C. Brawley, since deceased, executed the written instrument hereinafter set forth. Omitting the description of the lands mentioned therein, the said written instrument is as follows:

"This Indenture, made and entered into this 25th day of April, 1895, by and between George Kinnear and Angie Kinnear, his wife; W. R. Brawley and Gertrude F. Brawley, his wife; D. C. Brawley and Ella R. Brawley, his wife, all of Seattle, King county, Washington, the parties of the first part, and the Seattle and Lake Washington Waterway Company, a corporation duly organized and existing under and by virtue of the laws of the state of Washington, with its principal office at the City of Seattle, Washington, the party of the second part,

"Witnesseth: that the said parties of the first part being the owners in fee simple of a certain island at the head of Elliott Bay, in King county, Washington, known and designated as Island Number 1, and being thereby entitled under the laws of the state of Washington to the preference right of purchase to the tide lands hereinafter described, do, for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, convey and quit-claim to the said party of the second part, its successors and assigns, the undivided one-half interest in the following described tide lands, together with the preference right of purchase of the same, under the laws of the state of Washington, to wit: [Description.] Together with all the rights and privileges in connection therewith, together with the preference right of the purchase thereof from the state of Washington, under existing laws.

"To Have and to Hold the same unto the said party of the second part, its successors and assigns forever. Second party as part consideration of this deed agrees to pay one-half of the costs and expenses incurred in making application and obtaining title to said lands from the state, also to accept and receive this deed to the undivided one-half of said lands in full payment of the subsidy subscribed by first parties to it, this being the subsidy subscribed; and further divide said lands equally between the parties hereto, each party paying one-half of the expense. Division of said lands to be made prior to the date when the first payment to the state must be made."

It is further alleged that, by assignment, the rights of said Seattle & Lake Washington Waterway Company have been transferred to the plaintiff, and that he is now the owner

of an undivided half of the interest in the lands set forth in the said instrument. It is also alleged that the defendants, in March, 1897, caused the commissioner of public lands for the state of Washington to execute and deliver to them a certain contract of sale for a portion of said lands, the same being described; that the plaintiff is, and has been, ready and willing to comply with all conditions required of him as grantee of the interest aforesaid, and has demanded of the defendants that they procure to be issued contracts from the said commissioner for the remainder of the lands; that he has further demanded a partition of the lands equally between himself and the defendants, and has offered to pay one-half of the expenses thereof; that such demand for division and such offer to pay one-half of the expenses occurred prior to the date when other contracts for other portions of said lands were obtained by defendants from the state of Washington, and prior to making the first payment thereon to the state; that defendants refused to render any statement of such expenses, or to make any division of the lands. The relief demanded by the complaint is that defendants shall be required to render a full account of the expenses incurred in obtaining the contracts from the state, and that when such account has been taken and the amount due from plaintiff ascertained, then upon payment of the amount into the registry of the court, the defendants shall be required to make a division of the lands.

A general demurrer to the complaint was overruled, and the defendants thereupon answered with denials, and also affirmatively alleged that the only deed, indenture, or contract they ever made in the premises with the said company was made in pursuance of, and as part of, a subsidy subscription to said company, the consideration for which was that the company should construct a canal connecting Lake Washington with Puget Sound. The answer then proceeds as follows:

"That the said Seattle and Lake Washington Waterway Company issued a pamphlet entitled 'Lake Washington Ship Canal,' addressed to the citizens of King county, wherein to use the language of the said pamphlet, 'The importance, feasibility and immense benefits of this canal, locally, and nationally,' were thoroughly set forth and which pamphlet concluded with the following paragraphs: 'The forests, coal and iron mines situated almost upon the shores of the lake, would practically be brought to the waters edge, and deep sea going vessels or small craft could be loaded with lumber, ores or coal at a minimum cost.'

" 'Returning to the manner by which the cost of the Lake Washington Ship Canal is to be provided for, it will readily be seen that it is absolutely necessary that this company ask from the land owners and others directly benefited by its construction such reasonable subsidies as may be necessary to cover the costs of extra expenditures entailed.'

" 'The construction of locks, as well as maintenance and securing of right of way would amount to a considerable sum. In view of the vital importance of this canal and the immense benefits which will accrue from its construction, it would seem that, as a mere business proposition devoid of all local patriotism, this matter will appeal forcibly and logically to every land owner, business man and citizen of King county. The subsidies are not solicited upon the proposed building of these waterways, but payment of the same is positively made contingent upon their actual and final completion.' "

It is then alleged that, in pursuance of the statements and proposals in said pamphlet contained, the defendants offered and agreed to donate to said company as a subsidy for constructing said canal, riparian rights in said tide lands. A written offer to that effect is set forth in the answer, the same being as follows:

"As owners of the large island at the head of Elliott Bay, known as the Kinnear and Brawley Island, we agree to donate to Lake Washington Waterway and Ship Canal Co., as a subsidy for cutting a canal from head of Elliott Bay to Lake Washington, one-half of all our riparian rights extending north from said island."

It is alleged that the above offer was accepted by said company, the plaintiff's assignor, and that in pursuance of such offer and acceptance, and as a part of the same transaction, the instrument sued on in this action was executed; that the sole consideration therefor was the construction of the ship canal as proposed in said pamphlet, and that the instrument was executed in full reliance upon, and with full faith in, the said pledge of said company; that the instrument was made with the full faith and belief on the part of defendants that said company would construct said canal in a reasonable time; but that almost seven years have since elapsed, and no part of said canal has been built; that the plaintiff had notice of all these facts prior to the assignment to him of said contract and the interest therein; that he is now asking the court to compel the defendants to surrender to him a one-half interest in the contracts which they hold from the state for the purchase of lands described in the complaint, without having done anything to earn the same.

A general demurrer to the affirmative defense was sustained, and the cause was tried without proofs in support of the affirmative defense. The court made findings of facts and conclusions of law, and entered a decree to the effect that the plaintiff shall pay to the defendants, or into the registry of the court, one-half of the costs and expenses incurred by the defendants on account of the contracts with the state for said lands, and the cause was referred to James McNeny, as referee, to take testimony and report his findings and conclusions upon that subject. The decree also declares that the plaintiff is the owner of a one-half interest in said tide land contracts, and provides for the partition of the lands. The defendants have appealed from the judgment.

It is first insisted that the court erred in overruling the demurrer to the complaint. This is urged upon the alleged ground that the complaint improperly joins three causes of action, viz., for an accounting, for specific performance, and for partition. The demurrer was general, however, and what-

ever might be said upon the merits of this question, we think the demurrer did not sufficiently raise it. Under our statute, Bal. Code, § 4942, several causes of action may be united in the same complaint when they arise out of contract express or implied, and the question of improper joinder is made a distinct and special ground for demurrer. Bal. Code, § 4907. The general demurrer did not, therefore, challenge the court's attention to this objection, and it was not error to overrule it on the ground here urged.

The next assignment is that the court erred in sustaining the demurrer to the affirmative defense. This presents a more serious question, and we think the contention of appellants must be upheld. Respondent contends that the instrument set out in the complaint is an absolute deed, conveying an undivided half interest in the preference right to purchase the tide lands therein described, and that he is entitled to relief accordingly. The instrument shows upon its face, however, that it was made in pursuance of a subsidy subscription, and the defendants have the undoubted right to show a failure of the consideration for the subsidy. It also shows that the appellants did not then have title to the lands which they could convey. They held only a preference right to purchase them from the holder of the title, the state of Washington, and they manifestly could do no more than agree that when title was acquired from the state, it should inure in whole or in part to the benefit of another. It matters not that the instrument may have been called a "deed." It was, in effect, no more than an agreement that appellants would cause a certain interest to be transferred to plaintiff's assignor when they acquired title from the state. The instrument shows that it was made as an agreement for subsidy purposes, all the terms of the subsidy not appearing therein, and appellants may show by answer what those terms were, and whether the consideration for their agreement has failed. *Sorrells v. McHenry,* 38 Ark. 127; *Morrow v. Hanson,* 9 Ga. 398, 54 Am. Dec. 346; *Jones v. Buffum,* 50 Ill.

277; *Jones v. Hathaway,* 77 Ind. 14; *Simpson Centenary College v. Bryan,* 50 Iowa 293; *Dodge v. Oatis,* 27 Kan. 762; *Rice v. Goddard,* 14 Pick. 293.

Appellants cite many other authorities upon this subject, but it would seem that further citation here is unnecessary. The instrument upon which the suit is predicated shows that it embodied an agreement by appellants to give a subsidy, and the answer alleges facts which, if true, disclose an absolute failure of consideration therefor. We think it states a complete defense. If appellants' agreement in the premises was made solely in consideration that the proposed Lake Washington canal should be built, and under the inducements and promises in the answer set forth, then the judgment of the trial court takes their lands from them and gives them to respondent without requiring him to render any compensation whatever in return. The mere statement of the proposition seems to us unconscionable. It is proper to say that the record shows that the judge who tried the cause did not pass upon the demurrer. He tried the cause upon the pleadings as theretofore settled, and expressed himself at the time he directed the decree as not fully satisfied with the result.

The judgment is reversed, and the cause remanded with instructions to vacate the judgment, and overrule the demurrer to the answer.

MOUNT, C. J., ROOT, CROW, DUNBAR, and FULLERTON, JJ., concur.

[No. 5873. Decided March 2, 1906.]

PETER PEARSON, *Respondent*, v. FEDERAL MINING AND SMELTING COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISKS—INJURY TO MINER—PROJECTING TRIP IN SHAFT CATCHING CLOTHING—QUESTION FOR JURY. In an action for personal injuries sustained by an employee in a mine, reasonable minds might differ, and the question of the assumption of risks is for the jury, where it appears that the plaintiff, an experienced miner, who was in charge of the cage which delivered the miners to the different levels of the mine, was injured through the fact that the clothing of one of the men on the cage was caught while descending the shaft by a projecting "trip" used for the purpose of dumping the ore loads into the ore pocket, that although the plaintiff knew that the "trip" projected into the shaft, and could hear it click every time the cage passed it, and that at times it had caught the clothing of the men riding on the cage, the shaft was dark, and the plaintiff had never seen the trip, had nothing to do with placing the men properly in the cage, and the same was daily used with safety.

Appeal from a judgment of the superior court for Spokane county, Albertson, J., entered June 27, 1905, upon the verdict of a jury for $1,000 damages sustained by an employee in a mine. Affirmed.

Graves & Graves and *B. H. Kizer*, for appellant.

Robertson, Miller & Rosenhaupt, for respondent.

MOUNT, C. J.—Action for personal injuries. The plaintiff recovered a verdict for $1,000 in the court below. Defendant appeals from a judgment entered on the verdict. At the close of plaintiff's case, defendant moved for a directed verdict in its favor. This motion was denied, and defendant elected to stand upon the case made by the plaintiff. The case was thereupon submitted to the jury, and a verdict was returned as stated.

Appellant relies upon but one point, which is that the trial

[1]Reported in 84 Pac. 632.

court erred in refusing to direct a verdict in favor of appellant, upon the ground that the respondent assumed the risk of the accident which caused his injury. The facts are these: Appellant was engaged in operating a mine in Idaho. Respondent was an employee working in the mine. This mine in which respondent was employed when injured was worked by means of levels running from a shaft. These levels were two hundred, four hundred, six hundred, eight hundred, and one thousand feet deep from the surface. To each of these levels a certain number of men were assigned in the work of getting out the ore. About twenty feet from the surface was an ore pocket or dump, to which the ore mined in the levels was hoisted through the shaft. Two shifts of men were employed; one shift working by day, the other by night.

In the shaft was a cage, which was used in hoisting ore from the levels to the ore pocket or dump above referred to, and in lowering and hoisting workmen to and from their work. The cage was made in three compartments or decks. The upper deck of the cage consisted of an iron car about six feet square and ten feet deep, called a "skip." It was capable of holding about five tons of ore, and was used exclusively for hoisting ore. The two lower decks were platforms for the workmen to ride upon. These decks were suspended from the skip, or ore car, by means of iron bars about two inches wide and eighteen inches apart. These bars came down on but two sides of the platforms, in an A shape. The other two sides of the platforms were open. The upper passenger deck was smaller than the lower one. The lower one held eight men. The upper one, being about one and one-half feet narrower, held but six men. When the men of a shift came to go to work, those working in the thousand-foot level were first sent down, being placed in position on the decks of the cage by the hoist man at the top of the shaft, eight men on the lower deck and six men on the upper deck.

In charge of the cage on the upper passenger deck was a

man called a "cager," who, when the cage had reached its destination and the passengers had gotten off, signalled the hoist man to draw up the cage. The cager remained on the cage, exercising these duties, until all the workmen of the shift were unloaded at the several levels. He then went about other work. When the cage was not in use in lowering and hoisting workmen, it was used for hoisting ore, by means of the skip or iron car, to the ore pocket or dump above referred to. At this pocket was a trip, consisting of a V-shaped piece of iron, projecting some two or three inches into the shaft but clearing the sides of the cage by about the same number of inches. When ore was being hoisted, a catch was turned so that the trip caught the iron car, causing it to turn and dump its load of ore into the pocket or ore dump. When workmen were using the cage, the catch was arranged so that the trip would not dump the car. The passenger decks as above stated cleared the trip, but the car struck it even when not arranged for dumping ore, making a clicking noise as the cage passed it.

When respondent was injured he was acting as cager in lowering the night shift of men to work. On the sixth or seventh trip down, while respondent was standing at his station on the upper passenger deck of the cage, and the cage was going rapidly down loaded to its limit with men, the clothing of a man named Farley, one of the workmen on the lower passenger deck, caught on the trip as the cage passed the ore pocket, and Mr. Farley was dragged from his place on the lower deck through the space between the lower and upper passenger decks, and then torn loose by the iron car as it came down, and his dead body was thrown upon the men standing on the upper passenger deck. The respondent was struck by Mr. Farley's body, bruised by his heavy shoes, and severely injured.

Respondent was an experienced miner, and had been employed in this mine for about eight months before he was injured. His work was as trammer for a period of about six

months, and as assistant cager for a period of about two months of that time. His work as trammer was pushing the ore cars on one of the levels. As cager or assistant to the cager, it consisted in riding on the cage and giving signals to the men at the hoist. These signals could only be given at the levels when the cage was not in motion. Respondent had been cager for about two months before his injury. In addition to the six or seven trips which he took each day in distributing the men to their places at work while he was cager, he had also ridden in the cage each day during the time he had been employed in the mine. He knew what the trip was like, its purpose and the manner in which it worked, and also where it was located in the shaft. He also knew when the cage passed it by its clicking noise. He also knew that it projected into the shaft and that other miners riding on the cage had caught their clothes upon it. He had once caught and torn his clothes upon it although he said he had never seen the trip. The shaft and cage were dark except at the openings of the levels into the main shaft. Light could not be carried on the cage on account of the draft caused by the rapid operation of the cage. At the time of the injury, respondent was on the upper passenger deck and on the side of the cage opposite the trip. Upon these facts appellant, apparently conceding that it was negligent in maintaining the trip in the condition described, contends that the danger of persons being caught thereon was apparent and known to the respondent, and was therefore assumed as one of the ordinary, obvious risks of his employment. The general rule is that, if the servant knows the danger, or if it is so patent that an ordinarily prudent person would see and appreciate it, and he continues in the master's service, he assumes the obvious risk; but if the defects in the machinery or appliances grow out of the want of ordinary care on the part of the master and are not so serious but that the appliances may be safely used with care and prudence, the master is liable where an injury occurs when the injured servant uses

the appliances with care. 20 Am. & Eng. Ency. Law (2d ed.), 126.

While the respondent in this case testified that he knew of the arrangement and location of the trip, and that he and others on different occasions had caught and torn their clothes upon it, we think it does not appear that the danger at the time of the injury was so patent that an ordinary person would see and appreciate it. The trip was not exposed where it could be seen. It was in the dark. While respondent heard it click against the iron car every time the cage passed it, he had never seen it. It had never done any more harm than to tear clothes prior to the time when he was injured. With care and prudence it could be, and was, passed daily with safety. Respondent, in order to avoid any danger, rode upon the opposite side of the car from the trip. The other passengers were placed upon the car by the man at the hoist. Respondent had no part in arranging these passengers in their positions, and he no doubt relied, as he had a right to do, upon the fact that the passengers were so placed by the master that the clothing of none of them would be caught upon the trip. Respondent stood upon the upper passenger deck on the side of the cage opposite the trip, where he was apparently perfectly safe. The cage and the shaft being dark, he had no opportunity to see and appreciate the danger of other passengers being caught and injured or hurled against him. He was careful for his own safety, and only assumed the risk which was apparent and obvious to him. If he had loaded the car, or if he might reasonably be held to have seen and appreciated the danger of other persons on the cage being caught upon the trip at the time of the injury, he no doubt would be held as a matter of law to have assumed the risk; but when it was shown that the cage was crowded to its limit so that he was unable to move from his position, that he was on the opposite side of the cage and upon another platform from the person who was caught and hurled against him, that the cage and the shaft were dark, so that he could

not see the other passengers or their positions upon the platform, that he was not required to place the passengers in position, and did not do so—these facts tend very strongly to show that the risk was not one assumed by him. He knew that the position of the trip made it liable to catch persons riding carelessly in the cage, yet with careful placing of the passengers and prudence in operating the cage, he also knew that the appliances were safe, because they were daily used with safety. The record does not show that Mr. Farley shifted his position upon the cage or that the passengers were loaded by a fellow servant or that respondent was negligent in any way. We have uniformly held that the question of assumed risk is for the jury where reasonable minds may differ upon it. *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Shoemaker v. Bryant Lum. etc. Mfg. Co.*, 27 Wash. 637, 68 Pac. 380; *Gaudie v. Northern Lumber Co.*, 34 Wash. 34, 74 Pac. 1009; *Jancko v. West Coast Mfg. etc. Co.*, 34 Wash. 556, 76 Pac. 78; *Currans v. Seattle etc. Nav. Co.*, 34 Wash. 412, 76 Pac. 87; *DeMase v. Oregon R. & Nav. Co.*, 40 Wash. 108, 82 Pac. 170.

This case upon its facts falls within that rule. The judgment is therefore affirmed.

ROOT, DUNBAR, HADLEY, FULLERTON, and CROW, JJ., concur.

[No. 5874. Decided March 2, 1906.]

J. B. SWEATT *et al.*, *Respondents*, v. S. L. HUNT, *Appellant*.[1]

MECHANICS' LIENS—SUBSTANTIAL PERFORMANCE—CONTRACTS—CONSTRUCTION BY OWNER—FAILURE TO CONDEMN WORK—LIEN FOR BALANCE. The failure of a contractor to place upon the walls of a building a third coat of plaster, which was not a substantial part of the contract, will not bar an action by him to foreclose a mechanics' lien for the balance due on the contract, less the cost of such third coat of plaster, where it appears that the terms of the contract were not clear as to whether two or three coats were called for, that the contract provided that the owner should construe the terms of the contract and his construction should be final, and that he could give a written notice condemning any part of the work as it progressed requiring compliance with the contract, and it further appears that he was present daily during the progress of the work, notified the contractor when the second coat of plaster was dry enough for the woodwork, and gave no notice that any of the work was improper and made no claim respecting a third coat of plaster until the contract was finished.

CONTRACTS — PERFORMANCE — WRITTEN NOTICE OF BREACH — EVIDENCE—ORAL OBJECTIONS—ADMISSIBILITY. Upon an issue as to the due performance of a building contract, evidence that the owner made oral objections during the progress of the work as to the manner of performance is inadmissible, where the contract provided that the owner could condemn by written notice any part of the work, which should thereupon be removed by the contractor, and that no such written notice was given.

MECHANICS' LIENS—FORECLOSURE—ATTORNEY'S FEES—ALLOWANCE IN SUPREME COURT. In an action to foreclose a mechanics' lien, in which the trial court fixed the amount of the attorney's fees, independent attorney's fees will not be allowed in the supreme court upon affirming the judgment.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered May 3, 1905, upon findings in favor of the plaintiffs, after a trial before the court without a jury, foreclosing a mechanic's lien. Affirmed.

Robertson, Miller & Rosehaupt, for appellant.

John C. Kleber, for respondents.

1Reported in 84 Pac. 1.

MOUNT, C. J.—This action was brought by respondents, to foreclose a mechanic's lien against certain property owned by appellant. The complaint alleged, that on October 19, 1904, the respondents entered into a written contract with appellant for the completion of some thirty-three rooms of a three-story building belonging to appellant, at an agreed price of $1,560; that respondents finished the said rooms in accordance with the contract; that appellant neglected and refused to pay the balance due thereon; that thereafter a mechanic's lien was filed against the building for the sum of $1,237. The prayer was for judgment for that amount, and $200 attorney's fee for foreclosing the lien.

Appellant answered admitting the contract, but denied that respondents had complied therewith and alleged that respondents had wholly failed to comply with the terms of the contract in a substantial manner as regards the plastering, plumbing, and painting the wood work. Appellant also alleged that he had been greatly damaged as a result of the nonperformance of the contract by respondents. The reply denied the new matter contained in the answer.

Upon the trial, the court found that the respondents had substantially performed the terms of the contract, and made findings favorable to the respondents, with one exception—that by reason of a doubtful provision of the contract relating to the plastering, respondents had failed and refused to put on the walls a carpet float of plastering, which appellant subsequently put on at a cost of $165, which sum was deducted from the amount found due from appellant to respondents; and a decree of foreclosure was entered for the balance. From that decree this appeal is prosecuted.

There are numerous assignments of error, nearly all of which are that the court erred in its findings of fact. We shall not discuss these assignments separately. The contract provides, among other things, as follows:

"The work included in this contract is to be done under the direction of the owner, and that his decision as to the true construction and meaning of the drawings and specifications shall be final. . . . The contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the owner or his authorized representatives; shall, within twenty-four hours after receiving written notice from the owner to that effect, proceed to remove from the grounds or buildings all materials condemned by him whether worked or unworked, and to take down all portions of the work which the owner shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and shall make good all work damaged or destroyed thereby. . . . The building shall be plastered in ten days from date, and the carpenter work shall be finished in one week after the plastering is dry. Owner shall have the right to say when the plastering is dry."

The specifications in regard to the plastering provided that,

"This lathing to receive two coats of plaster; first coat to be brown hair mortar properly composed of fresh burnt lime, clean sharp bank sand and plenty of long cattle hair, well soaked; all to be well mixed before applying. Second coat to be of lime and sand mortar with comparatively little hair, and all to be put on with sufficient force to secure a good clinch. Plaster full to all grounds, plumb and square all angles. Carpet float for calcimining walls."

At the trial the principal contention in the case was over the plastering. The evidence showed conclusively that the appellant was in attendance upon the work every day, and nearly all the time. He saw how everything was done. He saw the plastering put on. When two coats had been applied and it had dried for several days, he notified the respondents that it was dry enough for the woodwork, which was thereupon put on by the respondents. No written notice by the owner was given condemning any of the work as unsound or improper, during the progress of the work. When re-

spondents had finished the whole work within the time agreed upon, and made a request for their pay, appellant thereafter, on December 6, 1904, served a written notice on respondents as follows:

"I hereby notify you that from the above date action will be taken as per article No. 5, in our building agreement, made the 19th day of October, 1904, as the plastering is unsatisfactory and the plumbing is not according to plans. By such default the building being unfinished is a pecuniary loss to me. Yours respectfully, S. L. Hunt."

Article No. 5, referred to in the above notice, was to the effect that if the contractor refused to properly perform the work, the owner, after three days' written notice, might perform the same and deduct the cost thereof from any amount due the contractor. A dispute then arose between appellant and respondents as to whether the specifications required two coats of plaster or three coats, appellant contending for three coats and respondents that they had fully performed the contract by placing two coats of plaster on the laths. Appellant thereupon employed other plasterers, and the third coat of plaster was placed upon the walls at an expense of $165. This item was allowed by the court, and the amount of it deducted from respondents' claim.

Appellant, however, contends that the failure of the respondents to place this third coat of plaster upon the walls was a substantial part of the contract, and because respondents refused to do it, that they had not performed their contract so as to maintain their action upon this lien. But such result does not follow. Under the terms of the contract, respondents were entitled to the balance due after deducting this item, and of course could maintain their lien for that balance. The terms of the contract relating to plastering as stated above were not clear; the meaning was doubtful; it was subject to construction. Respondents construed the specifications as meaning but two coats of plaster, and completed the work upon that construction. The appellant was present and made

no objection until the work was fully performed and a demand for payment was made by respondents. He then, for the first time, raised the point. The contract provided that the owner should construe the terms of the contract, and that his construction should be final. Under this provision, the owner was authorized to require three coats of plaster, provided he did not mislead the contractors, and made his objections in time. Respondents are not contending now that appellant waived his rights by silence or failure to object at the time the plastering was placed upon the walls. When appellant employed others to complete the work and deducted the amount necessary to pay for it from the amount due on the whole work, the balance was due to the respondents. Respondents were entitled to their lien for such balance.

Appellant contends that the plumbing and painting were defective, and evidence was offered to show that oral objections were made during the progress of the work, but the court correctly excluded these offers, because the contract required such notice to be in writing. Appellant does not contend that he made any expenditures in order to remedy any defects in the plumbing or painting. The evidence, we think, shows that this work was done in accordance with the plans and specifications. We have carefully examined all the evidence in the case and are of the opinion that the findings of the court are clearly in accordance with the facts about which there is very little dispute.

The court below allowed the respondents an attorney's fee of $150 for foreclosing the lien. Respondents ask us to make an additional allowance of $200. We have heretofore refused to make orders of this kind. *Lavanway v. Cannon,* 37 Wash. 593, 79 Pac. 1117. The request is therefore denied.

We are satisfied that the judgment appealed from does substantial justice between the parties. It is therefore affirmed.

ROOT, DUNBAR, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 5901. Decided March 2, 1906.]

J. W. BLAKE, *Respondent*, v. B. H. YOUNT *et al.*, *Appellants*.[1]

USURY—COMPOUNDING INTEREST. A promissory note, payable in one year, drawing interest at 10 per cent per annum, and providing that if not paid when due the interest should be added to the principal and the whole sum to draw interest thereafter at 12 per cent per annum, does not violate Bal. Code, § 3669, providing that no greater sum than 12 per cent shall be taken; since simple compounding of interest is not usurious, and since, where the debtor can avoid the payment of a larger sum by the payment of a smaller sum at an earlier date, a larger sum is a mere penalty and not usury, where no subterfuge is employed compelling the payment of a larger sum of interest not allowed by statute.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered July 13, 1905, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action upon a promissory note. Affirmed.

Routhe & Maxwell, H. J. Hibschman, and *H. N. Martin,* for appellants, contended, among other things, that the note was usurious. *Miller v. Life Ins. Co.,* 118 N. C. 612, 24 S. E. 484, 54 Am. St. 741; *Brown v. Crow* (Tex. Civ. App.), 29 S. W. 653; *Watson v. Mims,* 56 Tex. 451; *Mitchell v. Napier,* 22 Tex. 121; *Thomas v. Murray,* 34 Barb. 157, 171; *Browne v. Verdenburgh,* 43 N. Y. 195; *Buttrick v. Harris,* 1 Bissel 442; *Missouri Val. Ing. Co. v. Kittle,* 2 Fed. 116; *Bang v. Phelps & Bigelow Windmill Co.,* 96 Tenn. 361, 34 S. W. 516; *Parks v. Lubbock,* 92 Tex. 635, 51 S. W. 322; *Drury v. Wolfe,* 134 Ill. 294, 25 N. E. 626; *Lee v. Melby,* 93 Minn. 4, 100 N. W. 379.

J. T. Mulligan and *H. A. P. Myers,* for respondent.

DUNBAR, J.—This was an action on a promissory note, secured by a real estate mortgage. The defense is, (1) that

[1]Reported in 84 Pac. 625.

the note was usurious; (2) that the court erred in not finding sufficient payment. The essential part of the note is as follows:

"$1,000.00 Wilbur, Wash., March 25, 1899.

"For value received, one year after date, I promise to pay at Wilbur, Wash., to the order of Isaac B. Armstrong, one thousand dollars in gold coin of the United States of America of the present standard value, with interest thereon at the rate of 10 per cent per annum from date until paid. If not paid when due the interest to be added to and become a part of the principal, and the whole sum of both principal and interest to bear interest thereafter at 12 per cent per annum."

Section 3669, Bal. Code, provides:

"Any rate of interest not exceeding twelve per centum per annum agreed to in writing by the parties to the contract, shall be legal, and no person shall directly or indirectly take or receive in money, goods or thing in action, or in any other way, any greater interest, sum or value for the loan or forebearance of any money, goods or thing in action than twelve per centum per annum."

And subsequent sections provide the penalty.

We do not think that the appellants' contention that this loan was usurious can be sustained. Nor is his contention sustained by the cases cited. In the case of *Brown v. Crow* (Tex. Civ. App.), 29 S. W. 653, upon which appellants strongly rely, the note in question was as follows:

"$200.00. Austin, Texas, September 12, 1892.

"Four months after date, for value received, I, we, or either of us promise to pay Osceola Archer, or order, in Austin City, Texas, at his law office, the sum of two hundred dollars, with interest thereon from date until paid at the rate of ten per cent per annum, interest to be paid semi-annually, and in default thereof the same shall become principal and bear the same rate of interest," etc.

Under the Texas statute, ten per cent was the maximum rate of interest allowed; and it will readily be seen that, under the conditions of the note in that case, the whole

amount of interest for a year would have been $20.50 instead of $20, which was the largest amount which the law would permit on the sum of $200, and was plainly obnoxious to the statute. But in this case the interest is not to be paid until the end of the year, and when so paid would fall short of the maximum amount, $20. It is true that, after the expiration of the year, the interest would be at the rate of twelve per cent on the $1,000 loaned, and on the accrued interest of $100, or the legal rate of interest on $1,100. But the extra $100 would belong at the maturity of the note to the lender, and not to the borrower; that amount he has legally earned, and we see no reason why he should not have the benefit of it. It is within the power of the borrower to avoid paying interest on this extra $100 by paying it to its legal and equitable owner, and if instead of paying it he appropriates it to his own use, there is no reason why he should not pay interest on it, the same as upon the original sum. It was evidently not the intention of the supreme court of Texas to hold in *Brown v. Crow, supra,* that the compounding of interest created usury, for the same court, in the case of *Geisberg v. Mutual etc. Loan Ass'n* (Tex. Civ. App.), 60 S. W. 478, in discussing this question of usury, said:

". . . it certainly cannot be held that a contract is usurious simply because under its provisions legal interest might be demanded upon overdue interest agreed to be paid in such contract. In such case the overdue interest becomes a separate interest demand from the principal of the contract, and the interest charged upon it cannot be added to or considered a part of the interest stipulated to be paid upon the principal, so as to make the contract usurious."

Miller v. Life Ins. Co., 118 N. C. 612, 24 S. E. 484, 54 Am. St. 741, is a case where a life insurance company lent to a borrower a sum of money at the full legal rate of interest, payable monthly, its repayment being amply secured by mortgage on real estate, but required the borrower, in addition to and as a condition of the lease, to take from and reassign to

it an endowment policy for a sum equal to the amount of the loan upon which the premiums should be paid monthly for seven years (or until his death), the payment of the premiums being also secured by the mortgage. There it was rightly held, we think, that the transaction was usurious; that it was the intent or purpose of the lender of the money to get more than the legal rate of interest for the loan; and the court properly stated that, if there be a provision, a condition, or a contingency in, or connected with, the contract, by which he may do so, the transaction is usurious. It was also stated in that case that, if the usurious character of a transaction is not manifest upon its face, but depends on facts and circumstances connected with the transaction as a part of the *res gestae* it is a question of fact as well as of law, and should be submitted to the jury.

Watson v. Mims, 56 Tex. 451, was a case where a note was given for $800, with interest at the rate of twenty per cent per annum. A partial payment was afterwards made, and a new note given for the principal and unpaid interest, amounting to $960, with interest thereon at the same rate, the law having in the meantime made a greater rate than twelve per per cent usurious. It was held that the second note was not a mere renewal of the previous one, but was a new and illegal contract by reason of the excessive rate of interest charged on the previously accrued interest. It is manifest that this decision was right, but it in no way tends to establish the fact that the note under discussion in this case is usurious. And so we think with all the other cases cited by the appellants—that none of them sustain the contention.

As showing that the note is not usurious, the respondent cites, *Hager v. Blake,* 16 Neb. 12, 19 N. W. 780; *Crapo v. Hefner,* 53 Neb. 251, 73 N. W. 702; *Havemeyer v. Paul,* 45 Neb. 373, 63 N. W. 932; *Geisberg v. Mutual etc. Loan Ass'n, supra; Martin v. Land Mortgage Bank* (Tex. Civ. App.), 23 S. W. 1032; *Stewart v. Petree,* 55 N. Y. 621, 14

Am. Rep. 352; *Hale v. Hale,* 1 Cald. 233, 78 Am. Dec. 490; *Gilmore v. Bissell,* 124 Ill. 488, 16 N. E. 925; *Bledsoe v. Nixon,* 69 N. C. 89, 12 Am. Rep. 642. These cases also support the contention that the simple compounding of interest is not usurious, and that, wherever the debtor by the terms of the contract can avoid the payment of the larger by the payment of the smaller sum at an earlier date, the contract is not usurious but additional, and the larger sum becomes a mere penalty. The rule is stated in 29 Am. & Eng. Ency. Law (2d ed.), 507, as follows:

"Stipulations to the effect that if the debt be not paid at maturity it shall draw interest thereafter at a rate greater than the statutory limit are now generally regarded as penalties to induce prompt payment, and as the debtor has it in his power to avoid paying the penalty by discharging the debt when due, such agreements are held to be free from usury."

Of course, if it appears upon the face of the transaction that there is any trick or device or subterfuge by which the borrower is compelled in order to get the money to pay a larger amount of interest than is allowed by the statute, the note will be determined to be usurious; as, for instance, where the interest is computed in advance and added to the principal, and the maximum rate of interest charged on the principal and interest so compounded. In such case it is evident that the borrower is compelled to pay more than the maximum rate of interest prescribed by the statute, because the form of the note can in no wise change the legal character of the contract. Or, if the interest is to be paid so often and if not so paid compounded, and it is evident that the intention is to obtain more than the legal rate of interest, the result would be the same. But in this case, where the interest is not due or payable until the end of a year, the cycle of time which is taken notice of by the statute, the borrower has the privilege of paying the interest at that time, and we see no reason for holding the note usurious. Nor are we able to discover

from the record that the court erred in finding the amount that was paid upon the note.

The judgment is affirmed.

MOUNT, C. J., ROOT, CROW, FULLERTON, HADLEY, and RUDKIN, JJ., concur.

[No. 5965. Decided March 2, 1906.]

G. A. SPROUL, *Respondent*, v. J. C. HUSTON *et al.*, *Appellants*.[1]

APPEAL—FAILURE TO MAKE FINDINGS—DECISION. Upon a trial before the court without a jury in an action for breach of contract, where the court fails to find the amount of the damages, and the evidence is not brought up on appeal, the judgment will be reversed with directions to find the amount of damages sustained, if any.

Appeal from a judgment of the superior court for Clarke county, Rice, J., entered June 3, 1905, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to recover damages for breach of contract. Reversed.

A. L. Miller, for appellants.

H. W. Arnold and *James P. Stapleton*, for respondent.

ROOT, J.—Respondent and appellants entered into a contract by which respondent was to receive $2.50 per thousand feet for cutting and delivering certain timber at the railway track of appellants. Respondent brought this action to recover damages against appellants on account of an alleged breach of said contract. The trial was had before the court without a jury. The trial judge made findings and conclusions, although not separately stating them. A judgment in the sum of $250 was made and entered in favor of respondent. Appeal is taken therefrom.

[1]Reported in 84 Pac. 631.

It is urged by appellants that the findings do not justify this judgment. An examination reveals no finding whatever as to the amount of the damages sustained by respondent. The nearest approach to a finding of this character is that where the trial judge states "that there was some saw timber to be taken off by plaintiff under his agreement, and plaintiff would have made some profits thereby." This could justify a judgment in nothing more than a nominal sum. Elsewhere there is a finding to the effect that appellants had advanced $150 to respondent. There is nothing to show that his damages exceeded this sum. The evidence is not brought to this court, and we must pass upon the sufficiency of the findings. We deem them insufficient to sustain the judgment for $250 made and entered by the court. The judgment will therefore be reversed, and the cause remanded with instructions to make a finding as to the amount of damages sustained by the respondent, if any.

MOUNT, C. J., CROW, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5776. Decided March 2, 1906.]

CHARLES H. REYNOLDS, *Appellant*, v. BLANCHE A. REYNOLDS *et al., Respondents.*[1]

APPEAL—DISMISSAL—NOTICE—SERVICE. An appeal will not be dismissed because of the filing of the notice of appeal before service thereof, or because of failure to file proof of service within five days, where the proof was subsequently made and no delay or injury results, in view of Laws 1899, p. 79, providing that an appeal shall not be dismissed for any defect in the notice or service thereof if the appellant shall forthwith perfect the appeal.

MORTGAGES—DEED ABSOLUTE IN FORM—EVIDENCE OF INTENTION—SUFFICIENCY. There is not clear and satisfactory proof that a deed, absolute in form, was intended as security for a debt owing from a son to his father, where it appears, that in May, 1891, the premises

[1]Reported in 84 Pac. 579.

were purchased for a consideration of $3,500, the conveyance made to the father, and in June of the same year the father agreed to sell the same to his son, giving a bond for a deed upon consideration that the son should pay to him a note for $2,000 dated on April 29, 1891; that the father died in 1900, leaving a will reciting that in 1889 he had made advances to the son in the sum of $8,000, and subsequently other sums for investment in real estate, and providing for the cancellation of all evidences of indebtedness against the son if he would accept such advances as the son's proportionate share of the estate without contesting the will; that the son testified that the property in question was purchased and paid for by him, and that his father loaned him $2,000 with which to make the final payment, and that the deed was made direct to the father as a mortgage to secure said $2,000; that the father held notes for large sums against the son which were in excess of his proportionate share of the estate, paid taxes on the land since 1891, and at one time wrote his son asking for a quitclaim deed as the bond for a deed had long since been due and "so to speak dead."

EVIDENCE—BEST AND SECONDARY—COPY OF CONTRACT. The copy of a contract is inadmissible where it appears that there were two originals of the same, both in the city where the trial was had, and there was no showing that either of them was lost or unobtainable.

WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. The oral evidence of a son, to question the conditions of a bond for a deed and other writings between himself and his deceased father, is inadmissible in an action against parties defending as representatives of the deceased, and as deriving title through the executor of his last will.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 15, 1905, dismissing, at the close of plaintiff's case, an action to quiet title, after a trial before the court without a jury. Affirmed.

E. H. Belden (D. R. Glasgow and *Guy B. Groff,* of counsel), for appellant.

James A. Williams and *Denton M. Crow,* for respondents.

MOUNT, C. J.—This action was brought by the plaintiff, who prayed in his complaint to be adjudged the owner of certain lots in Spokane, and that his title to said lots be quieted against the claims of the defendants. After issues joined upon the facts, the cause was tried to the court. At

the close of plaintiff's evidence, the action was dismissed. Plaintiff appeals.

Respondents move to dismiss the appeal, because the notice of appeal was first filed and then served, and because proof of service of the notice of appeal was not filed within five days after the service of the notice. Prior to the act of 1899, the latter ground of the motion was held sufficient for a dismissal of the appeal. *Puckett v. Moody,* 17 Wash. 609, 50 Pac. 494, and cases there cited. But since that time the amendment of 1899 was passed, which materially changes the prior act, and which provides that no appeal shall be dismissed for any defect in the notice of appeal or the service thereof, if the appellant shall forthwith perfect the appeal. It is conceded in this case that a proper notice was served within time, and that proof thereof was subsequently made, but not within time. This later statute was evidently intended to cover such cases. Since the appeal appears not to have been delayed, or respondents injured in any way, the motion to dismiss is denied without terms.

Upon the merits, the facts as shown by the record are that, on May 11, 1891, Job Reynolds, who was appellant's father, purchased from James Monoghan and wife the land in question, for a consideration of $3,500. At that time the appellant was indebted to his father, Job Reynolds, in large amounts, which indebtedness was evidenced by promissory notes. On June 23, 1891, Job Reynolds agreed to sell said lands to his son, this appellant, upon consideration that the son would pay to his father a promissory note for $2,000, dated April 29, 1891, and due April 29, 1894. At the time of this agreement, the said Job Reynolds executed and delivered to his son a bond for a deed, which was to be made upon compliance with the terms of the note. Appellant did not pay the note when it matured, and thereafter, upon a request of his father, refused to pay it. On March 6, 1899, the said Job Reynolds made his last will, which contained the following provision:

"Fifth. Whereas, on the 1st day of February, A. D. 1889, at the instance and request of my son Charles H. Reynolds, I made an advancement to him of the sum of $8,000, which said advancement was made and paid by me and accepted by the said Charles H. Reynolds as his full distributive share of my estate as heir at law or otherwise at the time of my death, and that by reason of the foregoing recital and the further fact of my having furnished large sums of money since the advancement above referred to and at the instance and request of my said son Charles H. Reynolds, for investment in real estate for his benefit, and as the same has been accompanied by great pecuniary loss to me, I have omitted him as one of the general beneficiaries under this will as he has received from me more than his pro rata share of my estate.

"Sixth. I direct that should my said son Charles H. Reynolds accept and concur in the provisions of my will that my executor shall cancel and deliver to him all of the various evidences of indebtedness which I may hold against him at the time of my death. Otherwise all such indebtedness shall be enforced against him for the benefit of my estate."

In June of 1900, Job Reynolds died, and subsequently his will was probated in the state of Iowa, where he resided. The will was not submitted for probate in this state. Appellant did not contest the will but, without filing any written acceptance, submitted thereto. Upon the settlement of the estate, the executor of the will conveyed the property in question to Florence M. Price, a sister of the appellant, and one of the legatees under the will, in consideration of $900, which was her distributive share of the estate. After the property had been conveyed to the said Florence M. Price, appellant placed his bond for a deed upon the records in Spokane county, and brought this action, claiming that he had purchased the property in 1891 from Monoghan and wife for a consideration of $3,100; that at the time of the purchase he paid Mr. Monoghan in cash $1,550 of the purchase price, and that a year thereafter, when the balance became due, he borrowed $2,000 from his father for the purpose of

paying the balance with interest, and that the title was thereupon conveyed by Monoghan and wife direct to his father Job Reynolds, as security for the payment of the $2,000; that the convevance to his father was in fact a mortgage; that by the terms of the will the note was cancelled, and thereby appellant became the owner of the property. There is no evidence in the record tending to show that the deed from Monoghan and wife to Job Reynolds was intended to be a mortgage to secure the payment of the note of appellant to his father for $2,000, except the inference in the bond itself, which recites that, if the appellant shall pay the said note at its maturity, then the said Job Reynolds will convey the property to the appellant; also some letters written in the year 1898 by Job Reynolds to his son, in which letters Job Reynolds asks his son for a quitclaim deed for this and other property, for the reason that the bond "has long since been due and is, so to speak, dead." It is conceded that Job Reynolds paid the taxes on the property from the year 1891 to the time of his death in 1900, and that appellant, upon demand of his father after the maturity of the note, refused to pay the said note.

Before a deed absolute in form will be declared to be a mortgage, clear and satisfactory proof must be produced to establish that the deed was given as security for a debt, and was really intended as a mortgage. We do not find such proof in the record before us. Appellant has never held the record title; the title passed directly from Monoghan and wife to Job Reynolds, and shortly thereafter Job Reynolds agreed to sell the property to his son for $2,000, and gave him a bond for a deed, which was to be executed upon the payment of a note for that sum with interest. The note appears to have been made about two weeks before the bond was given. The note was never paid. It is true, the last will of Job Reynolds released all notes held by him against his son, but it did not provide for the conveyance of the prop-

erty to the son. It appears that the father held notes for large sums against the son, and that his son had received advancements for more than his distributive share of the estate. The will provided for the cancellation of all these notes, and nothing more. The transaction between appellant and his father, in regard to the land in question, was either a mortgage or an agreement to sell upon the payment of $2,000. The record satisfies us that the latter was the true condition, and being so, the appellant is not entitled to the land because he has not paid the purchase price. Under the terms of the will he is entitled to a cancellation of the note and nothing more.

Appellant claims, by his pleadings, that he was the purchaser of the land from Monoghan and wife; that in the year 1898 he entered into a contract of purchase with said Monoghan for the sum of $3,100, and paid thereon $1,550 at the time the contract was made. But subsequently his father loaned him $2,000 with which he made a final payment on the land, and that a deed was made directly from Monoghan and wife to his father to secure that sum. Appellant testified, that there were two original copies of this alleged contract, one held by Monohghan and one by an agent of appellant; that both these originals were in the city of Spokane at the time of the trial. Neither of these originals was offered in evidence, and there was no showing that either of them was lost or not obtainable. Appellant offered in evidence a purported copy made by himself from the original, which the court properly rejected, because the copy was not the best evidence.

Appellant complains that the court erred in rejecting oral evidence of the appellant himself, to explain the conditions of the bond and other writings between appellant and his deceased father. The respondents in this action are defending as representatives of Job Reynolds and as deriving title through the executor of his last will. The statute provides

in such cases that "a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person." Bal. Code, § 5991. The court properly rejected the offered evidence.

Upon the record before us, the judgment of the lower court appears to be right. It is therefore affirmed.

ROOT, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

CROW, J., having been of counsel, took no part.

[No. 5978. Decided March 3, 1906.]

JOHN B. HART *et al., Respondents,* v. THE CITY OF SEATTLE *et al., Appellants.*[1]

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE. Where asphalt has been removed for the lowering of an improved street, which is necessary in order to properly connect the ashpalt of a new improvement with that of the older one, the court is justified in finding that there is a change of grade in the older improvement.

SAME—DAMAGES. Where a proposed change of grade will result in serious damage to abutting property the improvement may be enjoined until the damage has been ascertained and paid.

SAME—INJUNCTIONS—TERMS OF. A temporary injunction to enjoin a change of grade until compensation for the damage to abutting property is first ascertained and paid is too sweeping where it enjoins the completion of the work upon the grade already established.

COSTS—APPEAL—MODIFICATION OF ORDER. Upon the modification of a temporary injunction, by the supreme court, the appellant should not recover costs on the appeal where they were resisting any injunction whatever, and it does not clearly appear that the modification of the order was especially called to the attention of the trial court.

Appeal from an order of the superior court for King county, Frater, J., entered September 30, 1905, granting a

[1]Reported in 84 Pac. 640.

temporary injunction against a change of street grade, after a hearing upon affidavits. Modified.

Scott Calhoun and *Elmer E. Todd,* for appellants, contended, *inter alia*: Cities will not be restrained from making public improvements upon slight showing. *Brown v. Seattle,* 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; High, Injunctions (3d ed.), § 1574; *Citizens Coach Co. v. Camden Horse R. Co.,* 29 N. J. Eq. 299; *Crandall v. Woods,* 6 Cal. 449; *Kohler v. Los Angeles,* 39 Cal. 510. If the injunction would create a greater wrong than it is intended to remedy, the party should be left to pursue his remedy at law. High, Injunctions (3d ed.), § 13; *McSorley v. Gomprecht,* 26 N. Y. Supp. 917; *Thomas v. Musical etc. Union,* 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175; *Pappenheimer v. Metropolitan Elev. R. Co.,* 128 N. Y. 436, 28 N. E. 518, 26 Am. St. 486, 13 L. R. A. 401.

William Parmerlee, for respondents.

HADLEY, J.—This action was brought to procure an injunction against the city of Seattle, the members of its board of public works, and the Independent Asphalt Company, to prevent the lowering of the grade of Thirteenth avenue north, a street in said city. The plaintiffs are the owners of lots 9 and 10, in block 9, Supplemental Plat of Frank Pontius' addition to Seattle, and also of lots 13 and 14, block 6, in the First Division of Capitol Hill addition to the city. Said lots have a continuous frontage upon the above named street. It is alleged that the defendants are paving and macadamizing the street; that they are wrongfully and unlawfully excavating and lowering the level of the street in front of said property; that the intended cut will be some three feet below the surface of the street as it now exists. It is stated that no ordinance has been passed by the city authorizing the threatened change of the established grade.

It appears that an improvement district was organized for

paving the street with asphalt, extending to the line of the Capitol Hill addition. The district therefore extends in front of the two lots first described, but not in front of the others which lie in the Capitol Hill addition. Asphalt pavement already exists in front of the Capitol Hill addition lots, and the new improvement is designed to connect therewith at the line of the Capitol Hill addition. The pavement, or at least a portion thereof, has been turned up in front of the Capitol Hill lots. There is a rise in the grade from a point near the place where the new grade connects with the older one, and it is alleged that it is the view of the city's officers that a lowering of the street is necessary in order to properly connect the asphalt of the new improvement with that of the older one. An emergency restraining order, without notice, was issued, and after notice and a hearing, a temporary injunction pending final hearing of the cause was granted. The city and its said officers have appealed.

It is first contended that it was error to grant any restraining order in the premises. It is said that the city denies that it is changing the grade, and it is also argued that, inasmuch as the lots are unimproved, the threatened change can result in but slight damage, for which reason the court should not have interfered. With regard to the fact as to the threatened change of grade, we think the court was justified, under the pleadings and affidavits submitted, in reaching the conclusion that such change was threatened by the city's officers. We also think the showing as to resultant damage justified interference by injunction. One of the affidavits placed the damages as high as $5,000, and the attendant facts stated are such as, we think, bring the case within the rule established by this court, that where a proposed change of the grade of a street will seriously damage an abutting owner's property, the change may be enjoined, unless the damage has been ascertained and paid. *Brown v. Seattle,* 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *Swope v. Seattle,* 35 Wash. 69, 76 Pac. 517.

In any event, appellants urge that the temporary injunction is too sweeping, and that it actually prevents them from finishing the street improvement without reference to any change of grade. Authority existed to pave the street with asphalt beyond the line of the Capitol Hill addition; but there was no ordinance providing for paving that portion of the street within that addition. Before the temporary restraining order was issued, the city's officers had, however, caused a portion of the pavement already within said addition and in front of respondents' lots to be removed. This seems to have been done with a view to making what they deed to be a proper connection with the new improvement, in order to form a continuous payment, and it incidentally involved the lowering of the grade. It is insisted that the order of the court prevents appellants from relaying the aforesaid pavement, even upon the established grade, and also from completing the improvement in front of respondents' other lots, which are actually within the improvement district. The order made at the time of the hearing simply continued in force the one first made. The terms of that order provide against the excavation and cutting down of the street, and also against "changing or altering the condition of Thirteenth avenue north." The latter clause probably supports appellants' contention. In that respect the order should be modified so as to make it clear that appellants may proceed to complete and repair the pavement upon the previously established grade.

While affidavits submitted at the hearing alleged that the order had the above stated effect, yet appellants were resisting any temporary injunction whatever, and it does not appear that the court was especially requested to eliminate the above feature at the time the last order was made. It is reasonable to suppose that, if the point had been made clear to the court by the presentation of a prepared order to that effect or otherwise, the request would have been granted.

In the absence of such a clear showing in the record, we think appellants should not recover their costs on appeal, notwithstanding the fact that the order is modified as a result of the appeal. Moreover since the order as made was procured at the instance of respondents, and is modified here, it would not be equitable for them to recover their costs on appeal. The cause is remanded with instructions to modify the order in the particular above indicated, and neither party shall recover costs on appeal.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5972. Decided March 3, 1906.]

D. M. QUARLES, *Respondent*, v. M. M. FREDERICK *et al.*, *Appellants*.[1]

CONTRACTS—SERVICES—TRIAL—VERDICT—COMPUTATION OF AMOUNT. In an action to recover for services performed, in which the principal controversy was as to a modification of the terms of the contract, whereby the plaintiff's wages were reduced from $35 to $25 per week after a certain date, making the balance due thereon either $111.65 or $257, a verdict for the sum of $217, is justified where there was evidence from which the jury might have computed the amount by reference to a different time than that specified as the time of the modification, or might have considered certain allowances for room rent in consideration of the modification of the contract.

Appeal from a judgment of the superior court for King county, Morris, J., entered July 3, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon contract. Affirmed.

Fred H. Peterson and *H. C. Force*, for appellants.

George McKay and *Thomas B. MacMahon*, for respondent.

PER CURIAM.—This action was brought by the respondent against the appellants to recover a balance claimed to be due

[1]Reported in 84 Pac. 634.

for services. The appellants are jewelers, and employed the respondent to work for them as a cleaner and repairer, agreeing to pay him for his services at the rate of $35 per week. The appellant worked from May 9, 1904, to September 24, 1904, and received in part payment for his services the sum of $493. At the conclusion of his services the respondent claimed that he was entitled to $35 per week for the entire time between the dates above mentioned, while the appellants claimed that he was entitled to $35 per week up to June 11 only, and $25 per week thereafter, averring that the agreement as to wages was modified by the mutual consent of the parties on June 11 to the effect that the respondent's wages should be $25 per week thereafter instead of $35 per week. Under the claim of the respondent there was a balance due him of $257; while under appellants' contention there was only $111.65 due. On the trial the jury brought in a verdict in favor of the respondent for $217, and for this sum judgment was entered in his favor by the court.

While the appellants assign three separate errors, they can all be summed up in the contention that the evidence does not support the verdict returned by the jury. The appellants admit that had the jury returned the amount claimed by the respondent, or the amount admitted to be due by them, the verdict could not be assailed on this ground, but they say there was no evidence whatsoever that the appellants owed the respondent $217; and, from the fact that the jury returned that sum as their verdict, they draw the conclusion that the verdict was the result of a wilful disregard of the facts shown at the trial, and a compromise of the conflicting opinions held by different members of the jury which the jury had no right to make. It is our opinion, however, that the evidence does justify the verdict. As we have stated, the principal contest was over the question whether or not there had been a change in the original contract with reference to wages. On this question there was evidence from which the

jury could have found that a change was made in accordance with the appellants' contention, not at the time claimed by them, but at a later date. It was in evidence, also, that the appellants had made some allowances as to charges for a room which they had rented to the respondent on the assumption that there had been a modification of the lease on June 11. If the wages be calculated on the basis of the later change, and the allowances for room rent the appellants deducted be charged to the respondent, the sum total is practically the verdict returned by the jury.

It is objected to this computation that the issues were not made upon such a theory. But the case was not tried on the theory made by the pleadings. Each side gave in evidence their version of the transaction regardless of the pleadings, and it is now too late to complain that the verdict does not accord with the claim of either party made by the pleadings.

The judgment is affirmed.

[No. 5847. Decided March 3, 1906.]

JOHN S. GRIM, *Respondent*, v. OLYMPIA LIGHT & POWER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANTS—MOTORMEN ON STREET RAILWAY. Motormen in the employ of a street railway company are fellow servants where it appears that the company had two freight motors for service on the line, which they were in charge of, that there was no fixed schedule for the running thereof, but the motormen arranged their own time schedules and places for meeting and passing, and were for over a year continually in a position offering opportunities for conferring and exercising influence and caution over one another (HADLEY and DUNBAR, JJ., dissenting).

SAME—ASSUMPTION OF RISK. In such a case one motorman runs the risk of injury from a collision with the other car happening through the failure of the motorman to stop the same upon a foggy morning where fogs were of frequent occurrence (HADLEY and DUNBAR, JJ., dissenting).

1Reported in 84 Pac. 635.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered May 20, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a motorman in a collision of street cars. Reversed.

T. N. Allen, Troy & Falknor, and *E. C. Hughes,* for appellants.

Vance & Mitchell, for respondent.

Crow, J.—This is an action to recover for personal injuries. The appellant is the owner and operator of a single track electric railway line, between the city of Olympia and the town of Tumwater. The line is used for the transportation of both passengers and freight. At Tumwater is located a brewery, and the tracks of the appellant company extend to the brewery for the purpose of affording means to transport beer in large quantities to the Northern Pacific railway depot, and also to a shipping dock, both of which are in Olympia. The electric railway company supplies the necessary cars, and motormen and brakemen to operate them, for transporting the beer.

Long prior to and at the time of the happening of the events here involved, it had been customary for the brewery company to call out cars whenever it desired to make shipments. No regular time schedule was, or could be, established for the running of the beer cars. There were at least four switches along the line, which were used to facilitate the passage of the cars. The operators of the cars were authorized to select the times for their running, and in this they appear to have been unrestricted except in the observance of the time schedules for passenger cars. Two beer cars were in use, and the motormen controlled their running time.

The method of operation was substantially as follows: When a car was loaded with beer at Tumwater, it was taken over the line to Olympia, and after the load was discharged,

was started on the return trip to Tumwater. Ordinarily it was expected that somewhere on the line the other car would be met on its way to Olympia with a load of beer. There was no established rule or custom as to a place for meeting and passing. The custom adopted by the motormen themselves seems to have been for each car to proceed when ready to go, and when it reached a switch, if the other car was not there and could not be seen approaching, the car at the switch continued on its course until it met the other car at a switch or elsewhere. If the two met between switches, the one nearest a switch was expected to retreat to such switch where a passage was effected. These arrangements were made by the motormen themselves, being the result of such conferences as they were enabled to have from time to time as they came in touch with each other.

On the day respondent received his injuries, he was acting as motorman of one of the beer cars. A Mr. Dye was motorman of the other car, and the latter car also pushed in front of it a flat car, both being loaded with beer. A Mr. Edwards was brakeman for the flat car. There were no conductors, the motormen having control of the movements of the cars. At an early hour in the morning, respondent proceeded to Tumwater with his car, where it was loaded with beer. He then started for Olympia. About the time he left Tumwater he saw that the other car and flat car had arrived in charge of Mr. Dye, and he knew that it was Dye's intention, when the cars were loaded, to immediately proceed with them to Olympia. Respondent proceeded with his car to Olympia, where the load was soon discharged, and he thereupon started on the return trip to Tumwater. He passed several switches without meeting the other car and flat car. The morning was very foggy, witnesses for appellant claiming the fog was generally heavy at all parts along the line, including the point of collision hereinafter mentioned; while respondent's witnesses contended it was "banked," being much heavier at

some places than at others. Respondent was accompanied on the return trip by his son, and also by a Mr. McIntosh, an employee of the brewery.

Testimony of the respondent was to the effect that his car was going at the rate of from five to eight miles per hour, when he and his companions discovered the other car with the flat car in front of it approaching through the fog. They estimate the distance between the two when they first saw the approaching cars at from two hundred to three hundred feet. Appellant's witnesses estimate the distance at from one hundred to one hundred and twenty-five feet. Respondent's witnesses also estimate the speed of the other cars to have been considerably greater than that of respondent's car, but appellant's witnesses estimate it at less.

Respondent's companions jumped from his car, but he remained at his post and says he succeeded in stopping. He also says he had just succeeded in starting his car on a backward movement, when the flat car plunged into his own. Appellant's witnesses contended that respondent never succeeded in stopping his car. Prior to the collision, the other motorman, Dye, and the flat car brakeman, Edwards, had jumped from their car. The latter was not at his brake upon the flat car, but was standing by the motorman on the motor car. The first impact stayed the progress of the flat car and its motor car, and caused them to retreat slightly; but immediately they plunged again into the respondent's car, and he was injured. Immediately after this, Mr. McIntosh jumped upon the pursuing motor car, and stopped it. Respondent says that, when he saw the other cars approaching, he believed there was time to avoid a collision; that if the power had been disconnected and the brakes set upon the approaching cars, as it was the duty of the motorman and brakeman to do, and as he assumed would be done, the collision would not have occurred. The testimony was conflicting as to whether Dye had set his brake and turned off the current before leaving his car.

The foregoing, we believe, is a fair statement of the more material facts. While there is some dispute as to some of them, yet we assume for the purposes of this opinion that the verdict of the jury has established the facts in accordance with respondent's contention. The complaint charges the appellant with negligence in the operation of the approaching cars, and avers that respondent had no power or authority of any kind over them. Other allegations of negligence were made, but are not before us on this appeal. The answer denies that the appellant was negligent; alleges that the respondent and the motorman upon the other car were fellow servants; that respondent was guilty of contributory negligence, and that he assumed the risk. The cause was tried before a jury, and a verdict was returned for the respondent. Appellant's motion for a new trial was denied. Judgment was entered upon the verdict, and this appeal has been taken.

Numerous assignments of error have been made, but we will discuss those only which have a controlling influence on this case as it is regarded by the majority of this court. Appellant's principal contention is that, under the undisputed facts as disclosed by the evidence, respondent and Dye were fellow servants; that if any negligent act was performed by Dye, it was the act of respondent's fellow servant for which appellant was not liable. On the other hand, respondent contends that Dye in charge of one train and respondent in charge of the other were vice principals or representatives of appellant, their common master. In support of this contention, respondent bases especial reliance upon the case of *Northern Pac. R. Co. v. O'Brien,* 1 Wash. 599, 21 Pac. 32, in which our territorial supreme court followed *Chicago etc. R. Co. v. Ross,* 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787. Respondent also calls attention to the fact that, although the *Ross* case has been overruled in *New England R. Co. v. Conroy,* 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, this court has still adhered to the doctrine of the *Ross* case in

Mullin v. Northern Pac. R. Co., 38 Wash. 550, 80 Pac. 814. With other authorities, he also cites *Conine v. Olympia Logging Co.*, 36 Wash. 345, 78 Pac. 932, in which this court cites with approval the case of *Cooper v. Mullins*, 30 Ga. 146.

We have carefully considered all these authorities, and others of similar character cited by respondent, but are unable to arrive at any other conclusion than to hold respondent and Dye to have been fellow servants. In *Hammarberg v. St. Paul etc. Lumber Co.*, 19 Wash. 537, 53 Pac. 727, Dunbar, J., after discussing the history of the doctrine of fellow servant, and commenting on the fact that the principles involved had by some courts, by inharmonious and indiscriminate application, been made productive of oppressive wrong, said:

"It is gratifying, however, to observe that recently judicial opinion seems to favor a restriction of the doctrine of nonliability for the actions of fellow servants, and the English rule, that a servant in command is a fellow servant, has been repudiated by a great majority of the American cases, and it seems now to be pretty well established that, in order to constitute one a fellow servant, he must be in the same common employment with the one who has suffered from his negligence. Shearman & Redfield, Negligence (4th ed.), § 234. And the question of whether particular employees are fellow servants is in some states submitted to the jury. *Mullan v. Philadelphia & S. M. S. Co.*, 78 Pa. St. 25 (21 Am. Rep. 2). The rule was announced in that case that the risk which the laborer assumes from the neglect of his fellow is where they are co-operating in the same business, so that he knows that the employment is one of the incidents of their common service. It has been held in Georgia that none are deemed to be in a common employment who have no opportunity to use precautions against each other's negligence. *Cooper v. Mullins*, 30 Ga. 146 (76 Am. Dec. 638). And this, we think, is in strict consonance with the just theory upon which the rule was first recognized."

There is no doubt but that the doctrine of nonliability of the master for negligent acts of fellow servants has been materially restricted in this, as well as some other jurisdic-

tions, but it certainly has not been entirely abolished. The rules of consociation of duties and connective or controlling influence are recognized by us.

In the latter portion of § 501, of his work on Master & Servant, Mr. Labatt says:

"The existence of common employment resolves itself into the inquiry, whether there was such a relation between the duties of the negligent and delinquent servants,—such consociation and co-operation in the performance of the work which was being done when the injury was received,—that such self-protection was reasonably feasible by one or other of the means noted in the cases cited in the following section."

Then follows § 501a, noting the various means of self-protection, in which the author in part says:

"An examination of the cases shows that the elements upon the existence or nonexistence of which the applicability or non-applicability of the doctrine of consociation depends are those indicated by the following paragraphs: (1) The fact that the injured servant had or had not an opportunity of observing the extent to which the negligent servant was competent for the performance of his duties and the manner in which he habitually conducted himself. . . . (3) the fact that the injured servant was or was not able to lessen the risk of injury, by exercising upon the negligent servant an influence calculated to promote caution and diligence on the part of the latter. . . . It will be found that the whole of these elements are seldom adverted to in a single case. As a general rule the courts content themselves with a reference to that particular one which happens to be suggested by the special aspect of the evidence under which the case has been submitted."

The undisputed evidence shows appellant had passenger cars running according to a fixed schedule or time table; that it had only two freight motor cars, one in charge of Mr. Dye and the other in charge of respondent. These freight motor cars had no fixed time or schedule for running, nor was it practicable that they could or should have any. They were called out at irregular and uncertain intervals by the brewery

people, when needed for hauling beer or other freight. The motormen in charge of these cars had received general instructions from appellant's manager against running at a high or unsafe rate of speed, and by common rule or consent of the company were permitted and expected to otherwise arrange their own schedule and plans. By reason of the necessity of the case, occasioned by their irregular periods of running, they arranged their own places of meeting and passing. It is not contended that the cars were in an unsafe condition, or that they were not properly constructed and equipped. Neither is it contended that the track, switches, or, in fact, any portions of the right of way were out of repair, or in a dangerous condition. Respondent had been employed in charge of his freight motor car for several years, and Dye, in charge of his for more than one year prior to the accident. During all this period of joint service they had personally arranged places of meeting, had acted together in one common employment, and were almost continually in a position affording frequent and repeated opportunities for conferring together and exercising influence and caution, the one over the other.

Now, applying the rules laid down by Mr. Labatt in the section—501a—above quoted, if any one of the methods of mutual self-protection mentioned by him existed, they were fellow servants and not vice principals. We find that respondent had ample opportunity for personally observing the extent to which Mr. Dye was competent for the performance of his duties, and the manner in which he habitually conducted himself; also that respondent had opportunities to lessen his risk of injury by exercising upon Mr. Dye an influence calculated to promote caution and diligence on his part. In *Donnelly v. Cudahy Packing Co.*, 68 Kan. 653, 75 Pac. 1017, the supreme court of Kansas says:

"From the authorities the following rule may be deduced: Whenever coemployees, under the control of one master, are

engaged in the discharge of duties directed to one common end, such duties being so closely related that each employee must know he is exposed to the risk of being injured by the negligence of another, they are fellow servants, and each assumes the risk to which he is thus exposed."

In 1897 the legislature of the state of Missouri enacted a statute providing that every railroad corporation owning or operating a railroad in that state should be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad by reason of the negligence of any other agent or servant thereof; thus abolishing the defense of fellow servants as to employees of such a company. This statute placed a greater restriction on the doctrine of fellow servant, when applied to employees of steam railroads, than has ever been recognized in this state; yet the supreme court of Missouri, in *Sams v. St. Louis etc. R. Co.*, 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475, not only held this statute did not apply to street railway employees, but also held a motorman and conductor on an electric street car to be fellow servants. Afterwards the court of appeals of Missouri, in *Stocks v. St. Louis Transit Co.*, 106 Mo. App. 129, 79 S. W. 1176, held a conductor on one trolley car was the fellow servant of a motorman operating another trolley car on the same line of street railway so that the one could not recover damages for personal injuries sustained by reason of the negligence of the other while in the discharge of his duties. In *Chicago City R. Co. v. Leach*, 208 Ill. 198, 70 N. E. 222, 100 Am. St. 216, the supreme court of Illinois held a gripman on one cable car to be the fellow servant of a conductor on another.

We think these authorities show a tendency on the part of the various courts of this country to apply a less strict rule to the doctrine of fellow servants when employees of a street railway company are concerned, than is applied to employees of a steam railway company. The distinction is apparent and reasonable, as it grows out of the fact that the

employees of street railway companies have more favorable and frequent opportunities to associate together and to exercise a controlling or restrictive influence one over the other. As said by the supreme court of Illinois, there is no similarity between the relations of servants on different trains on a steam railroad which are run under orders and directed by a train dispatcher, for the purpose of preventing interference and collision, and the relations of servants on street cars which followed each other over tracks and managed their trains with reference to each other.

In this case it was the duty of the respondent and the motorman Dye to jointly manage their trains in such a manner as to avoid collision or danger, and for this purpose they had ample authority and opportunity to complete arrangements satisfactory to themselves. Under the undisputed facts of this case, we arrive at the conclusion that respondent and Dye were fellow servants, and that appellant as their common master was not liable for any personal injuries which respondent has sustained by reason of any negligent acts of Dye, performed by him while in the discharge of his duties as motorman.

Without regard to the question of fellow servant, respondent cannot recover, for the further reason that he assumed all risks and dangers naturally or necessarily incident to his employment. He was engaged as motorman in charge of his car, running under the same methods and on the same plan for a period of several years prior to the accident, and for more than one year had been associated with Dye to such an intimate extent that he had ample opportunity for observing the manner in which Dye discharged his duties, and also had ample opportunity for knowing all dangers liable to arise. It was a very common occurrence for fogs to prevail upon the line of the right of way, and respondent must have known that additional dangers were liable to arise by the presense of such fogs. This accident was one respondent might have anticipated as a natural consequence of existing conditions,

and the system under which the freight cars were operated. In any event, he must be held to have been fully aware of all the dangers necessarily incident to his employment, and having continued in such employment for several years, he must be held under the law to have assumed all the risks necessarily incident thereto, and such assumption of risk is an available defense to be interposed by appellant.

In view of what we have said upon the defenses of fellow servant and assumption of risk, it is not necessary to discuss any other assignments of error. The judgment of the superior court is reversed, and the cause is remanded with instructions to dismiss the action.

MOUNT, C. J., and ROOT, J., concur.

FULLERTON, J., concurs in the result.

RUDKIN, J., concurs on the first ground discussed in the opinion.

HADLEY, J. (dissenting)—I dissent from the conclusion reached by the majority in this case. In view of former decisions of this court upon the subject of fellow servants, I believe the majority opinion tends to create confusion as to what doctrine the court intends to establish in relation to liability for the acts of employees under some circumstances.

Appellant's counsel have exhaustively and ably argued the law upon the subject of fellow servants, and have cited and reviewed many authorities. The authorities upon this subject are so hopelessly at variance that it would be as impossible to harmonize them as it would be unprofitable to review them in this opinion. This court early approved the doctrine of *Chicago etc. R. Co. v. Ross,* 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787. It was held in that case that a conductor of a railway train, or one who has the right to command the movements of the train, represents the company while performing those duties, and does not sustain the relation of a

fellow servant to other employees of the company on the train. This court applied the doctrine of that case in an opinion written by Burke, C. J., in the early case of *Northern Pac. R. Co. v. O'Brien,* 1 Wash. 599, 21 Pac. 32. It is true that decision was rendered in territorial days, and a short time before the organization of the state, but the court as subsequently organized has repeatedly applied the principles of the *Ross* case. In the late case of *Mullin v. Northern Pac. R. Co.,* 38 Wash. 550, 80 Pac. 814, the court said:

"Appellant cites the leading case of *New England R. Co. v. Conroy,* 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181, where that court enters into a lengthy review of the doctrine of fellow servants, and overrules the case of *Chicago etc. R. Co. v. Ross,* 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787. This court has previously avowed its determination to abide by the principles announced in the decision of the *Ross* case, and has refused to follow the doctrines announced in the later case just above cited."

It will therefore be seen that this court has refused to depart from the principles of the *Ross* case, notwithstanding the fact that it has been overruled by the court that rendered that decision. If the principles of the *Ross* case are applied to the case at bar, then the motorman who controlled and directed the approaching car was not a fellow servant with respondent. He was not under the direction of any conductor, but had entire charge of the movements of the car, and as fully represented the master as did the conductor in the *Ross* case. Under the rule here discussed, both he and respondent were delegated by appellant to control their respective cars, and each stood as the representative of appellant, controlling and directing an independent agency of appellant's business, that agency being the management and control of a car for the transportation of freight. The cars were as distinct in their character as separate railway trains, unless a different rule should be applied to electric or street railway companies, which appellant contends should be done.

Upon this point the case of *Chicago City R. Co. v. Leach,* 208 Ill. 198, 70 N. E. 222, 100 Am. St. 216, is cited. It was held in that case that gripmen and conductors whose duties are to run their trains in such a manner as not to injure those in charge of trains next preceding or following them, and who have power and opportunity to exert an influence over each other, are fellow servants with other men in the service running such preceding or following trains. The theory of the decision is, that such employees are engaged in the same character of service; that they are brought into such relations with each other as to depend upon each other for their safety, and that they have power to observe the manner in which each discharges his duty, and to influence each other by caution, advice, and example. Three judges refused to concur in the opinion, and dissented. The supposed influence of one employee over another under such circumstances, it seems to me, is too remote. How can an employee upon one car, who is busy attending to his own duties, anticipate the negligence of those in charge of another in such a degree as to exercise a preventive influence when the negligence occurs? The opportunity to exercise such an influence at such a time, in the nature of things, would seldom be afforded. The opportunity for that preventive influence which establishes the relation of fellow servant should be such as enables one to exert some such reasonably direct influence as may tend to avoid threatened negligence that may result in injury. Such was the theory upon which *Conine v. Olympia Logging Co.,* 36 Wash. 345, 78 Pac. 932, was decided. I am unable to distinguish in principle between the relations of Conine and the engineer in that case and those of respondent and the controller of the approaching car in this case. In the former case we said:

"The situation alleged as we have seen, was such that appellant could not see the engineer, and had not an opportunity to exercise any preventive influence over him, or to guard himself against the act of starting the engine at the time it

was done. They were neither in sight, nor within reasonable hearing distance of each other. While the work of each was directed to a common end, yet they were so remote from each other that they had no opportunity for the connective influence by which one fellow servant is required to guard himself against the neglect of another, and it appears that sufficient means for so doing had not been supplied by respondent."

In any event, the circumstances of the Illinois case differed from those in the case at bar. That involved a double track street railway, and there were established rules for operating cars under a regular and continued service, while the cars in the case at bar were operated at irregular and uncertain intervals. But even if the facts were in all respects similar, I am nevertheless unable to distinguish the present case from the principle applied in the *Conine* case. Other decisions are cited by appellant to the point that the employees upon one street car are fellow servants with those upon another. These are based upon the theory that the association of such employees is sufficiently close to enable them to exercise a preventive influence over each other and are from jurisdictions where this doctrine has not been limited to as close association in a common employment as has been done in this state. Some Federal decisions are cited. Emphasis is placed upon the authority of the case of *Baltimore Trust etc. Co. v. Atlanta Traction Co.*, 69 Fed. 358, as being exactly in point here. There it was held that the conductors of two electric railway cars on the same road are fellow servants, and that the common employer is not liable for an injury to one resulting from a collision caused by the negligence of the other. The trial judge said in the opinion

"The question is raised as to whether the two conductors are fellow servants, as applicable to the question of employers' liability. My opinion is that they are. I think they are such under the general law and under the decisions of the supreme court of the United States. Any other conclusion

cannot be reached from the later decisions of the supreme court."

It will be observed that the learned judge refers to the authority of the later decisions of the supreme court of the United States. The decision in the *Ross* case had not been actually overruled at that time, but the tendency of the later decisions was such that the Federal trial judge doubtless felt under obligations to hold as he did. In view of the position which this court has taken as to the *Ross* case, the later Federal decisions are not authority here. Under the decisions of this court, the motorman of the approaching car in the case at bar was the delegated representative of the master, having control and direction of the car, and the respondent at the time of the accident was not associated with him in such a common employment as enabled him to exercise a preventive control or influence over the motorman, and make him the fellow servant of the latter. If the motorman was negligent, then as the master's representative, his negligence became that of the master so far as his relation to the respondent was concerned. Whether he was negligent in abandoning the car, in failing to disconnect the power and set the brakes, and whether his acts in the premises proximately caused the collision and injury, were all for the jury. A similar application of principles was made by this court in the following cases: *Bateman v. Peninsular R. Co.*, 20 Wash. 133, 54 Pac. 996; *Uren v. Golden Tunnel Min. Co.*, 24 Wash. 261, 64 Pac. 174; *Shannon v. Consolidated etc. Min. Co.*, 24 Wash. 119, 64 Pac. 169; *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100.

The majority opinion holds that respondent assumed the risk of the danger. He did not assume the risk of negligence of appellant through its representative in the matter of improperly controlling and handling the operating mechanism of the other car. He was not required to anticipate negligence in that regard. That danger would arise from such

negligence of the master's representative was not to him open and obvious, and every reasonable expectation was against it. In that particular appellant was obligated to furnish him a safe place in which to work. Appellant is not relieved from the responsibility because it left these men free to operate the cars when they chose. The railway and cars belonged to appellant, and they were being operated by its authority, in its behalf, and for its profit. It had delegated the motorman to direct and control the movements of the approaching car, and respondent did not assume the risk of negligent control of that car.

Upon any ground discussed in the majority opinion, I think the judgment should be affirmed.

DUNBAR, J. (dissenting)—I concur in what Judge Hadley has said above, and fear that it will be difficult now to determine what the law in relation to fellow servants is in this state.

[No. 5514. Decided March 5, 1906.]

R. CUNNINGHAM, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—MAINTENANCE OF FIRE DEPARTMENT—NEGLIGENCE OF EMPLOYEES—LIABILITY. A city is not liable for damages caused by a horse used in its fire department, which was permitted to trespass upon plaintiff's lawn through the negligence of the firemen, since the maintenance of its fire department is the exercise of a governmental function (RUDKIN, FULLERTON, and DUNBAR, JJ., dissenting).

Appeal from a judgment of the superior court for King county, Albertson, J., entered June 23, 1904, upon findings in favor of the plaintiff after a trial on the merits before the court without a jury, in an action to recover for damages to

[1]Reported in 84 Pac. 641.

plaintiff's lawn, caused by a horse kept by defendant in its fire department. Reversed.

Mitchell Gilliam and *Hugh A. Tait,* for appellant.

H. E. Foster, for respondent.

ON PETITION FOR REHEARING.

ROOT, J.—A petition for a rehearing was granted in this case. After reargument and a careful consideration of the question involved, the majority of the court have been unable to reach a conclusion different from that heretofore announced. *Cunningham v. Seattle,* 40 Wash. 59, 82 Pac. 143. An exhaustive examination of the authorities convinces us that there is no legal escape from that conclusion. It is sought to distinguish this case as being one of trespass and not controlled by the ordinary rule that municipalities are not holden for damages occasioned by its officers and agents in the exercise of its governmental functions. We think no such distinction is established by the authorities or sustainable on principle. To uphold such a distinction would be to entail absurd consequences. To illustrate; a fireman negligently absents himself from the city's fire engine, under his control, and for lack of attention the boiler explodes, hurling a mass of iron which damages a citizen's lot. It is admitted that the citizen cannot recover against the city. The same fireman absents himself from the engine horses under his care, and for lack of attention one escapes and tramples the citizen's lawn. The latter, under respondent's theory, is entitled to recover damages because it is a trespass. Take another illustration. A fireman purposely or accidently "turns the hose" upon a citizen's yard, and injures it without subjecting the city to damage. But if he purposely or carelessly permitted the city's fire engine horses to go into said yard, respondent says the city *would* be liable. Another—if a city's policeman while on duty should go upon the premises of a citizen and unlawfully beat him, the city would not be liable.

But if the policeman had one of the city's horses under his control, and permitted it to stray upon the citizen's lawn, it is contended that the city would be liable. Again, if the horses hauling the fire engine are negligently handled by the driver, and on account of his carelessness, run across a citizen's lawn, no liability is thereby occasioned against the city. But if the fireman's attention is drawn from the horses to the fighting of a dangerous fire or for any other purpose, and the horses in the meantime trespass upon the premises of a citizen, it is urged that the city is holden for damages.

In the absence of a statute or established judicial authority, we are not justified in recognizing such distinctions. In the discharge of governmental functions, the city exercises a portion of the state's sovereignty. "The king can do no wrong," was long ago a familiar maxim. The principle is still extant and pervades our laws except where its application has been limited by constitutions, statutes, and the customs, institutions and conditions of our people. It is a logical consequence of the conditions where it obtains. Politically and socially, what is a city? An aggregation of people. Who owns the fire engine horses? The people comprising the city. Respondent owned as great an interest in this horse as any other citizen of Seattle. Can a person maintain an action against his associates for injury done him by an animal owned jointly by him and them? Can he sue them for the result of a trespass which could not have occurred but for the neglect of the animal's keeper who was the servant of himself and them jointly? When this respondent sues the city of Seattle for the injuries occasioned by its trespassing horse, is he not prosecuting his joint owners (perhaps himself also) for damages done by his horse while running loose as a result of the neglect and carelessness of his own servant, the fireman?

It is said that the case does not depend upon the negligence of the fireman. Let us see if this argument is consistent with respondent's other contentions. He claims that

it was the duty of the city to prevent its horses from trespassing. It was necessary that this duty should be performed by some agent or servant of the city. The fireman was the agent or servant upon whom the city fixed that obligation. If he had not neglected the duty, the horse would not have escaped. His neglect was negligence. Hence, it is impossible to conceive of the horse being at large except as a result of negligence—of a breach or neglect of duty—on the part of some agent employed to care for the horse.

The rule exempting municipalities from liability for negligence in the matter of governmental functions has one well recognized exception—that in regard to injuries sustained upon sidewalks, streets and public places. Possibly there are other exceptions, but we are not advised of any covering a case like that at bar.

In *Lawson v. Seattle,* 6 Wash. 184, 33 Pac. 347, this court, through Dunbar, C. J., said:

"We believe there are no authorities which support appellant's contention that a municipal corporation is liable for the negligence of firemen engaged in the line of their duty. The authorities cited by appellant certainly do not maintain this proposition, but on the contrary most of them assert exactly the opposite proposition, viz., the rule that a municipal corporation is not liable for the negligence of firemen engaged in the line of their duty. This is so plainly the well established rule that it is scarcely necessary to discuss it. See Dillon on Municipal Corp. (4th ed.), § 976, and cases cited."

In *Russell v. Tacoma,* 8 Wash. 156, 35 Pac. 605, 40 Am. St. 895, Anders, J., speaking for the court, employed this language:

"While it is not always easy to draw the line between the public, or governmental, and private powers of municipal corporations, we think the respondent city, under the facts in this case, in improving the park, was exercising a power or franchise conferred upon it for the public good and not for private corporate advantage. And this being so, it is not liable for the acts or omissions of its officers in that behalf."

In *Sutton v. Snohomish,* 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, this court spoke as follows:

"In preserving the peace, caring for the poor, preventing the destruction of property by fire, and preserving the public health, it [the city] assumes duties which are said to be in their nature solely governmental (Jones on Negligence of Municipal Corporations, Ch. IV.), and for the non-exercise, or negligent exercise, of which the corporation is not generally liable to individual citizens."

In *Lynch v. North Yakima,* 37 Wash. 657, 80 Pac. 79, the following appears:

"It would seem, therefore, that in creating, maintaining, and operating the fire department, the city was exercising governmental functions. This seems to have been the view entertained by the courts that have considered this subject. In the case at bar the respondent had provided, and was maintaining, a fire department. The horses, engines, and apparatus were under the charge of a fire chief. In view of these facts, and in view of the character of the employment in which appellant was engaged, it impresses us as a case where the circumstances of his injury occasion no liability upon the part of the city."

In the case last cited, there was a second cause of action based upon negligence of the city officers in handling a smallpox patient. Touching that branch of the case the following language was used:

"The handling of persons sick with contagious diseases is a duty which the city performs, through its officers and agents, in the exercise of governmental functions. The benefits of such service go to the public, and not to the municipality as a corporate body. Hence, the manner in which the officers of the city perform said service cannot, ordinarily, render the municipality liable in damages."

In *Murtaugh v. St. Louis,* 44 Mo. 479, the supreme court of Missouri spoke as follows:

"Where the officer or servant of a municipal corporation is in the exercise of a power conferred upon the corporation

for its private benefit, and injury ensues from the negligence or misfeasance of such officer or servant, the corporation is liable, as in the case of private corporations or parties; but when the acts or omissions complained of were done or omitted in the exercise of a corporate franchise conferred upon the corporation for the public good, and not for private corporate advantage, then the corporation is not liable for the consequences of such acts or omissions on the part of its officers and servants."

Cooley, Torts (2d ed.), p. 739, says:

"For taking or neglecting to take strictly governmental action, municipal corporations are under no responsibility whatever except the political responsibility to their corporators and to the state. The reason is that it is inconsistent with the nature of their powers that they should be compelled to respond to individuals in damages for the manner of their exercise. They are conferred for public purposes, to be exercised within prescribed limits, at discretion, for the public good; and there can be no appeal from the judgment of the proper municipal authorities to the judgment of courts and juries. Therefore, one shows no ground of action whatever when he complains that he has suffered damage because the city he resides in has made insufficient provision for protection against fire, or because cattle are not prohibited from running at large."

2 Dillon, Mun. Corp., § 976, uses this language:

"The exemption from liability in these and the like cases is upon the ground that the service is performed by the corporation in obedience to an act of the legislature; is one in which the corporation, as such, has no particular interest, and from which it derives no special benefit in its corporate capacity; that the members of the fire department, although appointed, employed, and paid by the city corporation, are not the agents and servants of the city, for whose conduct it is liable; but they act rather as officers of the city, charged with a public service, for whose negligence in the discharge of official duty no action lies against the city, without being expressly given; the maxim of *respondeat superior* has, therefore, no application."

5 Thompson, Negligence, at § 5789, says:

"A frequent expression of this doctrine is, that no private action will lie against a municipal corporation for damages sustained in consequence of its neglect to perform a *public* or *governmental duty*, or in consequence of the trespasses or misfeasances of its officers or agents in the performance of such a duty; . . ."

In Current Law, vol. 4, p. 737, the following appears:

"In the extinguishment of fires and in making arrangements therefor, a municipal corporation acts in a governmental capacity, and is not liable for the negligent construction, maintenance or use of its appliances."

The following are a few of the many cases bearing upon the question involved herein: *Hafford v. New Bedford,* 16 Gray 297; *Tindley v. Salem,* 137 Mass. 171, 50 Am. Rep. 289; *Wheeler v. Cincinnati,* 19 Ohio St. 19, 2 Am. Rep. 368; *Jewett v. New Haven,* 38 Conn. 368, 9 Am. Rep. 382; *Mead v. New Haven,* 40 Conn. 72, 16 Am. Rep. 14; *Burrill v. Augusta,* 78 Me. 118, 3 Atl. 177, 57 Am. Rep. 788; *Grube v. St. Paul,* 34 Minn. 402, 26 N. W. 228; *Bryant v. St. Paul,* 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31; *Hayes v. Oskosh,* 33 Wis. 314, 14 Am. Rep. 760; *Maxmilian v. New York,* 62 N. Y. 160, 20 Am. Rep. 468; *Ham v. Mayor,* 70 N. Y. 459; *Wilcox v. Chicago,* 107 Ill. 334, 47 Am. Rep. 434; *Welsh v. Rutland,* 56 Vt. 228, 48 Am. Rep. 762; *Fisher v. Boston,* 104 Mass. 87, 6 Am. Rep. 196; *Curran v. Boston,* 151 Mass. 505, 24 N. E. 781, 21 Am. St. 465, 8 L. R. A. 243; *Robinson v. Evansville,* 87 Ind. 334, 44 Am. Rep. 770; *Rivers v. City Council,* 65 Ga. 376, 38 Am. Rep. 787; *Hart v. Bridgeport,* 13 Blatchford 289; *White v. Yazoo,* 27 Miss. 357; *Richmond v. Long's Admr's,* 17 Grat. 375, 94 Am. Dec. 461; *Eastman v. Meredith,* 36 N. H. 284, 72 Am. Dec. 302; *Hunt v. Boonville,* 65 Mo. 620, 27 Am. Rep. 299; *Sherbourne v. Yuba County,* 21 Cal. 113, 81 Am. Dec. 151; *McCrowell v. Mayor,* 5 Lea (Tenn.) 685; *Kansas City v. Lemen,* 57 Fed. 905; *Cooley v. Freeholders*

of Essex, 27 N. J. L. 415; *Condict v. Jersey City,* 46 N. J. L. 157; *Nicholson v. Detroit,* 129 Mich. 246, 88 N. W. 695, 56 L. R. A. 601; *Ogg v. Lansing,* 35 Iowa 495, 14 Am. Rep. 499; *Edgerly v. Concord,* 59 N. H. 78.

In *Lawson v. Seattle, supra,* this court, *inter alia,* said: "It is a well known fact that the apparatus used by the fire company is not under control of the city, but is under the special control and inspection of the fire company." If this be a correct proposition, it would seem to irresistibly follow that the horse involved in this case was not under the control of the city. Ordinarily, an action for damages caused by a trespassing animal must be maintained against the person having the custody and control of said animal. As a rule, the owner is not liable where the custody and control is at the time in some one else. Cooley, Torts (2d ed.), p. 401; Ingham, Animals, p. 234; *Reddick v. Newburn,* 76 Mo. 423; *Ozburn v. Adams,* 70 Ill. 291. It is, however, not necessary to base our decision upon this ground.

It is a hardship for respondent to be denied damages in this case. His would seem to be one of a class and character of injuries for which the legislature might properly permit recovery against the municipality. But until the law-making body makes provision therefor, we are without authority to award a judgment for damages in such a case. Courts must follow the law as they find it.

The decision heretofore announced will not be disturbed.

MOUNT, C. J., HADLEY, and CROW, JJ., concur.

DUNBAR, FULLERTON, and RUDKIN, JJ., dissent.

[No. 5822. Decided March 5, 1906.]

MARY A. MURPHY *et al.*, *Appellants*, v. T. A. MURPHY *et al.*, *Respondents*.[1]

PLEADINGS — DEMURRER — AMENDMENTS. Upon sustaining a demurrer to a petition and granting leave to amend, the court is not thereby precluded from overruling a demurrer to an amended petition stating substantially the same facts with some additional averments.

EXECUTORS AND ADMINISTRATORS—ESTATE OF NONRESIDENT—NECESSITY OF ADMINISTRATION. It is unnecessary to administer upon the estate of a nonresident testator who never resided in this state, and who left no personal property here, after the lapse of more than ten years after his death, he having left no debts and there being no liens upon the real estate of which he died seized, Bal. Code, § 4642, providing that in such case the estate shall vest immediately in the heirs without the necessity of administration.

SAME—APPOINTMENT AND REMOVAL. The court in probate has the power to revoke the appointment of an administrator c. t. a. upon the application of the heirs upon its being made to appear that there is no legal necessity for administration.

Appeal from a judgment of the superior court for King county, Frater, J., entered May 12, 1905, after a hearing on the merits, discharging an administrator c. t. a., upon the application of the devisees. Affirmed.

F. C. Kapp, for appellants. The superior court had exclusive jurisdiction. *Hanford v. Davies*, 1 Wash. 476, 25 Pac. 329; *Kerr v. Moon*, 22 U. S. 565, 22 L. Ed. 161. Nor would the fact of the testator's death oust it of jurisdiction. *McKee v. Simpson*, 36 Fed. 248; *Healy v. Buchanan*, 34 Cal. 567; *Grimes v. Talbert*, 14 Md. 169. When a litigant waives a demurrer he is conclusively bound thereby. *Watson v. Town of Kent*, 35 Wash. 21, 76 Pac. 297; *Healy v. King County*, 37 Wash. 184, 79 Pac. 624. The court had no power to make a ruling inconsistent with a former ruling still in force. *Buffalo Pitts Co. v. Dearing*, 37 Wash. 591, 79 Pac.

[1]Reported in 84 Pac. 646.

1104; *Morrison v. Berlin,* 37 Wash. 600, 79 Pac. 1114. An administrator, after his appointment, can only be removed or discharged upon statutory grounds. *Morgan v. Dodge,* 44 N. H. 255, 82 Am. Dec. 213; *Miller v. Hider,* 9 Colo. App. 50, 47 Pac. 406; *In re Strong's Estate,* 119 Cal. 663, 51 Pac. 1078. The probate court has no discretion to refuse administration of an estate, when it is applied for by an heir or devisee. *In re Pina's Estate,* 112 Cal. 14, 44 Pac. 332; *Langsdale v. Woollen, Adm'r,* 99 Ind. 575; *Blake v. Kearney,* 30 La. Ann. 388; *Succession of Buillard,* 111 La. Ann. 186, 35 South. 508; *Williamson v. Mason,* 18 Ala. 87; *Marshall v. Crow's Adm'r,* 29 Ala. 278. Under the undisputed facts an administration is absolutely necessary. *Hanford v. Davies,* 1 Wash. 476, 25 Pac. 329; *Ferguson v. Templeton* (Tex. Civ. App.), 32 S. W. 148; *Chamberlin's Appeal,* 70 Conn. 363, 39 Atl. 734, 41 L. R. A. 204; *Wing v. Hall,* 47 Vt. 182; *In re Nugent's Estate,* 77 Mich. 500, 43 N. W. 889; *Appeal of McCarty,* 81 Mich. 460, 45 N. W. 996; *Griesemer v. Boyer,* 13 Wash. 171, 43 Pac. 17; *Kapp v. Public Adm'r,* 2 Bradf. (N. Y. Surr.) 258; *Burch v. Burch,* 19 Ga. 174; *Cushman v. Albee,* 183 Mass. 108, 66 N. E. 590.

James Kiefer and *Hughes, McMicken, Dovell & Ramsey,* for respondents, to the point that the court was not bound to grant an administration merely because one of the devisees requested it, irrespective of the fact whether or not administration was necessary, cited: Bal. Code, §§ 4642, 6141; 1 Woerner, American Law of Administration, §§ 199, 201; 11 Am. & Eng. Ency. Law (2d ed.), 742; *Fretwell v. McLemore,* 52 Ala. 124; *Tucker v. Brown,* 9 Wash. 357, 37 Pac. 456; *Griffin v. Warburton,* 23 Wash. 231, 62 Pac. 765; *Anrud v. Scandinavian-American Bank,* 27 Wash. 16, 67 Pac. 364; *Akin v. Akin,* 78 Ga. 24, 1 S. E. 267; *Gwin v. Melvin,* 9 Idaho 202, 72 Pac. 961; *Flood v. Pilgrim,* 32 Wis. 376; *Wright v. Smith,* 19 Nev. 143, 7 Pac. 365; *Saul v. Frame,* 3 Tex. Civ. App. 596, 22 S. W. 984; *Granger v.*

Harriman, 89 Minn. 303, 94 N. W. 869; *Angier v. Jones,* 28 Tex. Civ. App. 402, 67 S. W. 449; *Succession of Graves,* 50 La. Ann. 435, 23 South. 738.

Crow, J.—On December 11, 1893, one J. H. Murphy died testate in Wahsington, D. C., being then a resident of that city. On January 23, 1894, his last will and testament was duly admitted to probate by the district court of the state of Iowa, in and for Scott county, a court of competent jurisdiction. Scott county, Iowa, seems to have been the previous domicile of said decedent, and he left there a considerable estate. Said decedent left surviving him his widow, one Mary A. Murphy, appellant herein, and two children, T. A. Murphy, a son, and Jessie A. Murphy, a daughter, respondents herein, his only heirs at law. The will provided for the payment of debts and certain special bequests, and that the residue of the estate should be distributed to Mary A. Murphy, T. A. Murphy and Jessie A. Murphy, share and share alike. It also provided that said residue of the estate should be held for five years after the death of the testator; that during said period the executor should make certain semi-annual payments to the widow and daughter of decedent from the income of their shares, and that at the end of said five years final distribution should be made. All debts and legacies were fully paid, and final distribution and settlement of the estate were had in the state of Iowa, prior to any attempted administration in this state.

The decedent left in King county, Washington, a considerable interest in real estate, but no personal property. He held an equitable title to such real estate, the record legal title being in respondent, W. M. Desmond, who held the same in trust for said J. H. Murphy. W. M. Desmond at all times recognized the rights of J. H. Murphy and of his estate, and was willing to transfer his interests by appropriate conveyances to the parties entitled thereto.

On January 16, 1905, more than eleven years after the

death of said J. H. Murphy, appellant Mary A. Murphy, his widow, caused to be filed in the superior court of King county, in this state, a petition for the purpose of having the last will and testament of said J. H. Murphy probated as a foreign will, and also having appellant R. P. Oldham appointed administrator c. t. a. Said petition, *inter alia,* alleged the probate of said will in Scott county, Iowa, and that J. H. Murphy died seized of certain real estate in King county, describing the same. An order was made fixing a time for hearing, proper notice was given, and on February 2, 1905, the will was admitted to probate as a foreign will, and appellant R. P. Oldham was appointed administrator c. t. a. The administrator qualified, notice to creditors was published, and on April 7, 1905, the administrator filed a petition in the probate department of the superior court of King county, alleging the legal title of the decedent's interests in said real estate to be in W. M. Desmond, and asking that he be cited to appear, and ordered to convey to the administrator. W. M. Desmond appeared, acknowledged the interests of said decedent, and stated that he was willing to convey the same to the proper parties, but alleged that the respondents T. A. Murphy and Jessie A. Murphy objected to his making any conveyance to the administrator.

Respondents T. A. Murphy and Jessie A. Murphy, being nonresidents of Washington, knew nothing of the application for the probate of said will and appointment of an administrator in King county until the appointment had been made. On March 30, 1905, they appeared by petition and alleged they were children, legatees, and sole heirs at law of the decedent; that J. H. Murphy's will had been admitted to probate in Iowa, where his estate had been fully settled and distributed; that during his lifetime he had acquired interests in real estate in King county, Washington; that he left no personal property in Washington; that W. M. Desmond, holding the legal title to said real estate, had been at all

times ready and willing to deliver deeds to said Mary A. Murphy, and to the petitioners for their respective shares; that there were no taxes or liens on said real estate; that J. H. Murphy was never during his lifetime a resident of the state of Washington; that he never had any debts therein; that said Mary A. Murphy and the petitioners, T. A. Murphy and Jessie A. Murphy, were the only persons interested in said estate, and were all of full age at the date of said testator's death; that no necessity existed for administration within the state of Washington, and that an administrator would entail large and unnecessary expense upon said petitioners, and said estate. The petitioners prayed an order revoking and setting aside the order appointing R. P. Oldham as administrator, and also asked for other relief.

To this petition the administrator interposed a demurrer, which being heard in the absence of the petitioners, was sustained, leave being given to amend. On April 7, 1905, an amended petition was filed, in substance the same as the original, but containing an additional allegation to the effect that said probate proceedings were instituted by the widow of decedent for the purpose of harassing and annoying petitioners, and for the further purpose of securing to herself a widow's allowance. The administrator moved to strike the amended petition, which motion being denied, he then demurred, and the demurrer was overruled.

The administrator thereupon answered, denying certain allegations of the amended petition, and making affirmative allegations not necessary to be here stated, as the controlling facts appear to be as above detailed and are not seriously disputed. The petitioners interposed a demurrer to this answer, which was sustained, and an amended answer being filed, a demurrer thereto was also sustained. Thereupon a hearing was had, and the trial court having found that there was no legal necessity for an administration in this state, made an order revoking the letters of administration, discharging said R. P. Oldham, and directing the petitioners,

T. A. Murphy and Jessie A. Murphy, to pay two-thirds of the taxable costs and disbursements expended herein by said Mary A. Murphy, the same amounting to $18.75. The court also ordered said W. M. Desmond to convey to said Mary A. Murphy, by proper deeds, her undivided interest in said real estate. From said final orders, the widow and administrator have appealed to this court.

Appellants contend the trial court erred in refusing to strike the amended petition, and also in overruling their demurrer thereto, insisting that, after a demurrer had been sustained to the original petition, the court could not lawfully overrule a demurrer to what was in substance the same pleading, especially without modifying its former ruling. We think there is no merit in this suggestion. The court granted leave to amend, an amendment was made, and the second demurrer was properly overruled.

Although several assignments of error have been made, the controlling questions herein are: (1) Could the trial court, after entering an order appointing an administrator, lawfully revoke said appointment and discharge him? (2) Could the trial court lawfully refuse the demand of the widow and legatee, Mary A. Murphy, for an administration in this state on the ground that it was unnecessary? These questions can be discussed together.

Appellants contend that the administration is necessary and must accompany the probate of the foreign will. In support of their position they cite *Hanford v. Davies,* 1 Wash. 476, 25 Pac. 329, which we do not think applicable, by reason of the subsequent statute of 1895, Bal. Code, §§ 4640-4645. The decedent had neither debts nor personal estate in the state of Washington. He had never been a resident of this state. If he ever had incurred debts here, they were barred as claims against, or liens upon, any real estate of which he died seized. Bal. Code, § 4642. This being true, it was not necessary to administer his estate in Washington for the purpose of freeing his real estate from liability

for any possible debts, and after his will had been probated and a showing had been made that his estate had been fully settled in Iowa, and all debts there had been paid, it was unnecessary to administer here for the purpose of ordering any disposition of said real estate to his legatees. Section 4640, Bal. Code, provides:

"When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his title shall vest immediately in his heirs or devisees, subject to his debts, family allowance, expenses of administration and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent: Provided, That no person shall be deemed a devisee until the will has been probated. . . . ."

Then follows § 4641, which provides that said act of 1895 shall apply to and govern the transmission of title of lands in case of the estates of persons already deceased.

Woerner, in 1 American Law of Administration, at § 199, says:

"The necessity of official administration, that is to say, of obtaining a grant of letters testamentary or of administration, as the case may be, and the judicial sanction of payment of debts and legacies out of the estate and the distribution of the residue, arises out of the common-law doctrine that the personal property of a decedent descends to the executor or administrator, while his real estate descends to the devisees or heirs, subject, under English and American statutes, to the payment of his debts and legacies."

In § 201, Mr. Woerner says:

"The rights of creditors to the assets of a deceased person is the principal reason for requiring official administration, and courts, therefore, sanction the disposition of the property of a decedent without the appointment of an administrator where it is certain that no debts are owing."

"It may be stated generally that the question of necessity for administration is one for the court having probate jurisdiction, and it appears to be a matter resting largely in the discretion of the court, especially where there are no debts, whether an administration shall be had or the estate awarded to the persons entitled to it without any administration. In some states there are statutes providing that administration shall not be granted after a certain time from the death of the decedent, and even in the absence of statute a long lapse of time since the death of the decedent without administration may raise a presumption against the necessity for any administration." 18 Cyc. 60.

If there be an administration of this estate in King county, the only possible duty devolving upon the administrator would be to secure an order of distribution, which would be superfluous, as the rights of the legatees in and to said real estate have, under our statutes, already vested in them, so that no decree of any court is needed to protect their title. All possible debts which might have been proven have been long since barred, and could not be a lien upon said real estate.

In *Fretwell v. McLemore,* 52 Ala. 124, Brickell, C. J., says:

"A court of equity will dispense with an administration, and decree distribution directly, when it affirmatively appears, that, if there was an administrator, the only duty devolving on him would be distribution. Then administration is regarded as a 'useless ceremony.' "

This language is cited with approval by Mr. Woerner, in § 201, of his work on the American Law of Administration.

The Am. & Eng. Ency. Law (2d ed.), Vol. 11, at page 742, states the law thus:

"The principle of the common law that the title to a decedent's personal estate passes to his personal representative makes administration necessary if there are creditors of the estate, so as to enable the creditors to bring suit and subject the property of the estate to the payment of the debts. In those jurisdictions, however, where the title to a decedent's

property vests in the heirs, subject only to the payment of debts, the rule is different, and the heirs may dispense with the necessity of administration by paying the debts."

In this case there was no personal property remaining to be administered, nor were there any debts to be paid. The assets of the decedent in this state being only an equitable title to real estate, such title had vested in the devisees, and their rights had become absolute under the statute, without the necessity of any administration or any decree of distribution. *Tucker v. Brown,* 9 Wash. 357, 37 Pac. 456; *Griffin v. Warburton,* 23 Wash. 231, 62 Pac. 765; *Anrud v. Scandinavian-American Bank,* 27 Wash. 16, 67 Pac. 364.

In view of the above authorities, we are of opinion that, under the facts shown, no real necessity existed for any administration in this state, eleven years having elapsed since the testator's decease, and his estate in Iowa having been fully settled there by a court of competent jurisdiction. Had any good and sufficient reason existed at any time for administration in Washington, the interested party desiring the same should have applied for the appointment of an administrator within at least six years after the death of said J. H. Murphy. We think the trial court committed no error in finding the administration unnecessary. *Flood v. Pilgrim,* 32 Wis. 376; *Granger v. Harriman,* 89 Minn. 303, 94 N. W. 869; *Succession of Graves,* 50 La. Ann. 435, 23 South. 738.

An administrator, however, was actually appointed, and appellants now contend the court had no authority to revoke such appointment, except upon statutory grounds. We do not think this contention can be sustained. The court did not remove him for the purpose of appointing a successor, but for the sole purpose of ending an unnecessary administration, which, for reasons above stated, was a proper order.

The judgment is affirmed.

Mount, C. J., Root, Dunbar, Hadley, Fullerton, and Rudkin, JJ., concur.

[No. 6002. Decided March 5, 1906.]

THE CITY OF SEATTLE, *Respondent*, v. F. C. PARK *et al.*, *Appellants*.[1]

EMINENT DOMAIN — PLEADINGS — ANSWER — STRIKING — HARMLESS ERROR. Upon a condemnation proceeding by a city to condemn property for widening and extending a street, under Laws 1905, p. 84, it is error to strike out a cross-petition of certain defendants setting up a leasehold interest in a building upon the property; but the same does not amount to reversible error where there were conflicting interests in the property and where the court proceeded in accordance with section 13 of the above mentioned statute to ascertain the total damage, leaving the distribution of the damages among the claimants of the several interests to be afterwards determined.

SAME — TRIAL — SEPARATE FINDINGS — ISSUE AS TO TITLE OF DEFENDANTS. Under Laws 1905, p. 84, § 8, providing that the jury shall ascertain the compensation to be paid to all persons claiming any interest in the land, does not relate to cases where there is doubt or contest as to such ownership, in view of § 13, providing that in such case the proceeding shall not be delayed; and the court may require the jury to ascertain the entire compensation, and adverse claimants to interplead, so as to fully determine the rights in the compensation ascertained.

SAME — RECORD ON APPEAL — PRESUMPTIONS. Where the record on an appeal does not contain the pleadings of the defendants, in a proceeding to condemn property for widening a street, under Laws 1905, p. 84, and it appears that twelve parties were represented by counsel at the trial, claiming interest in the property, the court may refuse to require the jury to assess the compensation to be paid each person; and in aid of a judgment it will be presumed that there was a doubt or contest as to the ownership of the property condemned authorizing such refusal within the meaning of § 13 of the act.

Appeal by defendants from a judgment of the superior court for King county, Gilliam, J., entered October 16, 1905, upon the verdict of a jury assessing the damages for the condemnation of property for the widening of a street, after a trial on the merits. Affirmed.

H. D. Moore and *Frank C. Park*, for appellants.

Scott Calhoun and *Elmer E. Todd*, for respondent.

[1]Reported in 84 Pac. 644.

HADLEY, J.—This is a condemnation proceeding, instituted by the city of Seattle to condemn certain property in aid of widening and extending Western avenue, a street in said city. The property here involved is a portion of lot 12 in block G, of A. A. Denny's addition to Seattle. There is a three-story frame building upon the land. The action was brought under the law of 1905, which relates to the exercise of the right of eminent domain by cities for public purposes. Laws 1905, p. 84, ch. 55. The statutory method as to the petition and notice was followed. The defendants interested in said property entered an appearance in the action, and before the trial the defendants F. C. Park and Ada F. Brown filed a cross-petition, to the following effect: That the Pacific Coast Company is the owner of the fee of said lot, and that in October, 1901, said company executed a lease for the whole of the lot to one Kirk and wife, for a term of twenty years; that under the terms of the lease the lessees were to erect upon the lot a substantial frame or brick building, two stories in height, which building, together with all other improvements placed upon the lot, shall at the termination of the lease become the property of the lessor as a part consideration for the lease. The defendants also alleged that, in pursuance of the provisions of the lease, the said lessees and their transferees erected a three-story frame building upon the lot, to be used, and which is now used, as a hotel and lodging house; that through mesne assignments and transfers, the lease is now owned and held as follows: an undivided one-half interest by Olof Olson, and the remainder by F. C. Park and Ada F. Brown, who each own an undivided one-fourth interest, and that the same was so owned prior to the commencement of this proceeding; that by the proposed condemnation a portion of said building will be cut off and removed, thereby greatly lessening the rental and revenue receipts that can be derived therefrom; that the removal of such portion of the building will require the construction of a new front in order to make the remainder

thereof habitable, and that other necessary alterations and repairs will be required to again put the building in condition for use and occupancy. The amount of resultant damages claimed is stated, and demand is made for a separate award to the lessees to be made separate and apart from the award to the owner of the fee.

On motion of the petitioner, the court struck the cross-petition, and the cause proceeded to trial before a jury. Demand was then made by the cross-petitioners, and other claimants of interests in the property, that the jury should be required to separately award the damages to the several claimants. This was denied, and the jury were required to find only the total damage to the whole property by reason of the condemnation; thus leaving the question of the distribution of the damages among the several claimants for future adjustment. In the verdict, the jury found separate amounts as damages for the taking of the land not including the building, for the taking of the portion of the building, for damages to the remainder of the building, and for the value of the removal of the portion of the building taken. No sum was returned as damages to the remainder of the land by reason of the taking of a part, the blank provided for that purpose being left unfilled. Judgment was entered upon the jury's findings, and this appeal is from the judgment.

It is contended that the court erred in striking the cross-petition. Upon this point respondent argues that the statute does not provide for any answer or pleadings on the part of owners of interests in the property. Section 8 of the act, however, does provide that any person claiming an interest "shall file the statement of his interest in and description of the lot, parcel of land, or other property, in respect to which he claims compnesation." We think the filing of the cross-petition was in compliance with that provision, and that it was error to strike it. Whether it amounted to reversible error, in connection with the trial that was after-

wards had upon the question of damages, must be determined by what is hereinafter said.

At the trial the cross-petitioners and other claimants offered evidence upon the subject of damages to their respective interests in support of their demand for separate findings of the jury as to the damages to the several interests. This was refused, and the court's ruling in that regard is also assigned as error. Appellants urge that, under § 8 of the statute, they were entitled to introduce such evidence and to have such separate findings. The pertinent portion of the section is as follows:

"Such jury shall also ascertain the just compensation to be paid to any person claiming an interest in any lot, parcel of land, or property which may be taken or damaged by such improvement. . . ."

The above seems to support appellants' contention. Section 13 of the act, however, provides as follows:

"No delay in ascertaining the amount of compensation shall be occasioned by any doubt or contest which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners or claimants, but in such case the court may impanel a jury to ascertain the entire compensation or damage that should be paid for the property or part of property, and the entire interests of all the parties therein, and may require adverse claimants to interplead, so as to fully determine their rights and interests in the compensation so ascertained. And the court may make such order as may be necessary in regard to the deposit or payment of such compensation."

The action of the court in the premises was based upon § 13 above quoted. At first glance there appears to be a conflict between §§ 8 and 13, but upon closer reading we think they do not conflict. The two must be read together and harmonized if possible. In view of the provisions of § 13, we think it should be held that § 8 relates to cases where there may be separate interests in the property, but where no conflict as to the ownership of such interests exists. In

such event, the section seems to grant to the several claimants the right to have separate awards of damages by the jury at the condemnation hearing. When, however, there is any doubt or contest as to the ownership of interests in the property, § 13 clearly authorizes the court to proceed at once to ascertain the entire damage to the whole property, and may then require the adverse claimants to interplead "so as to fully determine their rights and interests in the compensation so ascertained."

The statement of facts brought here shows that the ruling of the court denying separate findings, and denying the introduction of evidence in support thereof, was for the reason that there were a number of diverse interests in the property, and that doubt existed as to the interests of the respective claimants. We find no pleadings in the record which disclose upon what the respective claims of interest are based, except as stated in the cross-petition heretofore mentioned. That alleges that the Pacific Coast Company is the owner of the fee, and that the leasehold interest is now owned by Olof Olson, F. C. Park and Ada F. Brown. The record of the trial, however, shows that twelve persons appeared at the trial, represented by counsel as apparently claiming interests in the property and in the damages resulting from the condemnation. In view of what appears in the record as to the reasons for the course taken by the court, we must therefore assume, in aid of the proceedings, that it sufficiently appeared that there was doubt as to the ownership of the respective interests, by reason of contesting and conflicting claims. The court did not, therefore, err in proceeding to cause the jury to ascertain the whole damage in the manner that it did. Section 13 plainly provides that in such a case a city shall not be delayed in the ascertainment of damages which a condemnation will cause to property by having to await the adjustment of differences between contesting claimants to conflicting interests in the property.

It will now be seen that the striking of the cross-petition was not material, so far as the trial which was had was concerned. It should, however, now be reinstated in the record as the interpleader of said cross-petitioners, pertaining to the disposition of the damages under the terms of § 13 of the statute, unless they shall desire to file a new or additional pleading.

The judgment is affirmed.

MOUNT, C. J., ROOT, DUNBAR, FULLERTON, RUDKIN, and CROW, JJ., concur.

[No. 6003. Decided March 7, 1906.]

HENRY LOHSE *et al.*, *Respondents*, v. FREDERICK R. BURCH *et al.*, *Appellants*.[1]

ADVERSE POSSESSION—CLAIM OF RIGHT—EVIDENCE—SUFFICIENCY. There is no sufficient evidence of claim of right or color of title to establish the title of Indians to real estate by the right of adverse possession, where it appears that, although they had for many years occupied the premises with rude huts, built on the edge of an inlet just above the line of high tide, and had at times maintained fences to control their ponies, they had never been known to make any claim to the land, and upon being asked as to their right thereto made no claim of right and consented to remove when required to do so, the only evidence of claim of title being the claim of one Indian witness, who would be its chief beneficiary, to the effect that he had paid $300 and received a writing from the owner giving him the perpetual right to reside upon the land, which writing was lost, and which evidence was contradicted by the declarations and acts of the other Indians.

SAME—EXCLUSIVE POSSESSION—SUFFERANCE OF TRUE OWNER. One claiming to be the true owner of premises cannot sustain title by proof of adverse possession as against parties who have admittedly held possession of a portion of the premises at the sufferance of the true owner.

SAME—PAYMENT OF TAXES—COLOR OF TITLE. To obtain title, under the statute, by the payment of taxes for seven years, the party

[1]Reported in 84 Pac. 722.

must hold under color of title and be in the actual, open, and notorious possession of the land, or it must be "vacant and unoccupied."

DEEDS — RECITALS AS TO HEIRSHIP — EVIDENCE — COMPETENCY. A deed reciting that the grantors are the sole heirs at law of the person who died seized of the land described is not competent evidence of that fact without proof of such heirship, as against one holding adversely to the grantee in the deed.

SAME—PRESUMPTIONS—ANCIENT DEEDS. The rule as to the presumption of the authenticity of recitals in an ancient deed cannot be applied to a deed made sixteen years prior to the commencement of the action, reciting that the creditors are heirs at law of the person who died seized of the premises, where lapse of time alone is relied upon without proof of the surrounding circumstances.

APPEAL—DECISION. Upon reversing an action to recover possession of real estate and quiet title, for failure of proof of title in either party, the cause will be remanded for further proceedings, in case the plaintiff elects to offer further proof.

Appeal from a judgment of the superior court for King county, Yakey, J., entered June 30, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to recover possession and quiet title to real estate. Reversed.

Frank C. Park and *Robert H. Lindsay, for* appellants.
Hastings & Stedman and *Jesse A. Frye,* for respondents.

FULLERTON, J.—In 1853 one William Heebner settled upon a quarter section of land, situated in what is now King county, claiming the same under the act of Congress of September 27, 1850, commonly known as the Oregon Donation Act. Patent to the land was issued after the death of Heebner, and runs "unto the heirs at law of the said William Heebner, deceased," without specifically naming them. In 1888 certain persons describing themselves in the instrument of conveyance as, "Ann M. Garber (widow) of Trappe, Montgomery county, Pennsylvania, Catherine Gross (widow) of Berkshire county, Massachusetts (both sisters and the only sisters of William Heebner deceased, late of King county,

Washington Territory), Samuel Y. Heebner and Rebecca H. Heebner, his wife, and Julia R. Heebner (a single woman), all of the city of Philadelphia (said Samuel Y. Heebner and Julia E. Heebner only surviving children of Charles Heebner, who was the only brother of William Heebner aforesaid, and who died prior to the death of said William Heebner) said grantors being all of lawful age and *sui juris* and the sole and only heirs at law of William Heebner, deceased, aforesaid," etc., conveyed the land to John P. Hoyt, who subsequently conveyed it to one George M. Boman, who in turn, by mesne conveyances not necessary to be further noticed, conveyed a part thereof to the respondent Henry Lohse. The part purchased by Lohse fronts on an inlet or small bay, forming a part of the waters of Puget Sound.

The defendants Sitwalqt, Kaquolt, and Homolgood are Indians. At the time Lohse made his purchase, they were residing on the land in small wooden shacks, built on the edge of the inlet just above the line of high water mark. As to the time when they first went upon the land, the evidence is conflicting. The testimony of the Indians is to the effect that their ancestors were on the land long prior to its settlement by William Heebner, and that they have been on it continuously ever since. They claim, furthermore, that after Heebner had settled upon the land, one of their ancestors — "Old Charley" — procured of him the perpetual right to live upon the premises, paying him for the privilege the sum of $300, taking from him a writing which acknowledged the receipt of the money and described the boundaries of the tract set apart to their use. This writing was not recorded, and was lost, so the Indians relate, in an accident resulting in the overturning of a canoe in which the person carrying the instrument was riding. Witnesses on behalf of the respondents, however, say there were no Indians on this land at the time it was settled upon by Heebner.

The appellants Burch claim through the Indians. Just the nature of their contract with him, the Indians seem not

to have any very clear idea. The record shows a deed from the Indians to Burch, conveying to him the fee in a tract described by metes and bounds, containing about 22 acres, reserving a life estate in the Indians for a portion thereof; the consideration for the conveyances being, according to Frederick R. Burch, the agreement on his part to protect them in their possession during their natural lives. The respondents are husband and wife, and brought this action to recover possession and quiet title in themselves to the property. The answer of the appellants was a denial of title in the respondents, and an affirmative allegation of title in themselves, followed by a prayer to the effect that their title be quieted. The cause was tried before the court without a jury, resulting in a judgment and decree in accordance with the prayer of the complaint. From the judgment and decree so entered, this appeal is taken.

Taking up the question of the appellants' title first, we find very little in the record that supports their claims, and nothing that appears to us convincing. The contention that the Indian Charley paid Heebner three hundred dollars for an interest in the land, and received from Heebner a writing evidencing the purchase, is in itself so highly improbable as to scarcely merit denial, and no time will be taken to refute it. It rests on the testimony of an Indian witness who would prove its chief beneficiary if the contention was deemed established, and is not only unsupported by any single scrap of other testimony, but is positively contradicted by the declarations and acts of the Indians themselves.

The contention that they have title by the statute of limitations is more plausible, but we think it not established. Undoubtedly these Indians have lived upon this land for a long period of time, and they have at different times maintained rude fences around portions of it for the purpose of controlling their ponies, and it may be that they have cultivated at different times small parts of it to garden vegetables; but

there is no evidence that they ever, until just prior to the commencement of this action, claimed that they held their possession as a matter of right. On the contrary, the evidence in the record that seems to us worthy of credence is all the other way. Lohse testifies that, before purchasing the land, he and his son, together with an interpreter, went to the Indians and inquired of them what claim they made to the land, and by what right they were living upon it, telling them at the same time that he contemplated purchasing it for a brickyard, and that if he did so he would need the land they were occupying, and it would be necessary for them to move; that the Indians then told him, and in this he is corroborated by both his son and the interpreter, that they made no claim either to the land or the right to occupy it, but would move away whenever required to do so. He further testifies that, after he had made the purchase and had commenced the construction of his brickyard, the Indians came to him from time to time as the work progressed, and inquired how soon he would need the place they were occupying, telling him they did not wish to move until it was necessary for them to do so. That finally when he told them he needed the land, they actually commenced moving, and had partially removed the effects from the property before they changed their minds. It appears, furthermore, that of all the many witnesses that were called to testify concerning the length of time the Indians had occupied the land, not one had ever heard them claim to own the same, or claim that they lived upon it by any other right than that of sufferance.

In this state possession of real property, to be adverse, must be actual, open, notorious, continuous, and under a claim of right or color of title. Mere naked possession is not sufficient. *Yesler Estate v. Holmes,* 39 Wash. 34, 80 Pac. 851; *Suksdorf v. Humphrey,* 36 Wash. 1, 77 Pac. 1071; *Hesser v. Siepmann,* 35 Wash. 14, 76 Pac. 295; *Port Townsend v. Lewis,* 34 Wash. 413, 75 Pac. 982; *Blake v. Shriver,*

27 Wash. 593, 68 Pac. 330; *Moore v. Brownfield,* 7 Wash. 23, 34 Pac. 199; *Bellingham Bay Land Co. v. Dibble,* 4 Wash. 764, 31 Pac. 30; *Balch v. Smith,* 4 Wash. 497, 30 Pac. 648. This record does not disclose such a possession as the rule announced in these cases requires. While the possession shown has been sufficiently long, open, notorious, and continuous to ripen into title for at least a part of the land in dispute, it was not shown to have been either under a claim of right or color of title, and without one or the other of these essentials, possession, no matter how open and notorious, or how long continued, can never ripen into title. We conclude, therefore, that the trial court did not err in refusing to quiet title in the appellants to the land in dispute.

Passing to the respondents' claim of title, we think the court erred in adjudging them to be the owners in fee of the property. In the court below the respondents seem to have relied solely upon their record title. In this court they insist that they not only have title of record but by virtue of the statute of limitations also. We find nothing in the evidence, however, to support the latter claim. The record not only fails to show that they have had open, notorious, and exclusive possession of the property under a claim of right for the statutory period, but it shows conclusively that they have not had exclusive possession at all. The appellants and their predecessors have been in possession of portions of the land since title was acquired thereto from the government of the United States, and while they have admittedly held at the sufferance of the true owner and cannot claim title by virtue of their possession for that reason, no one else can claim title by adverse possession as against them. Their possession is adverse to every one except the true owner. Nor for the same reason can they claim title by virtue of the seven year statute. By that statute the claimant must not only have color of title and pay the taxes for seven consecutive years,

but he must be in the actual, open and notorious possession, or the land must be "vacant and unoccupied." Here, the claimants neither had possession, nor was the land vacant and unoccupied, during the years they claim to have paid taxes upon it.

The claim of the respondents must rest therefore upon their record title, and unless the deed from Ann M. Garber and others to John P. Hoyt was admissible as evidence without proof that the grantors were the heirs at law of William Heebner, they have failed to show title sufficient to warrant the relief awarded them by the judgment of the trial court. It is our opinion that it was not admissible without proof of such facts. In *Mace v. Duffy,* 39 Wash. 597, 81 Pac. 1053, we held that recitals in a deed to the effect that the grantors were the sole heirs at law of the person who died seized of the land conveyed were not competent evidence of the fact of heirship against one claiming the land adversely to the grantee in the deed. There the deed was of recent execution, and obviously the rule was correctly stated as to such deeds. If the rule were otherwise, then one claiming lands as the sole heir at law of the person dying seized of it could escape the necessity of proving his heirship by conveying the land to a third person and reciting in the instrument of conveyance that he is the original owner's sole heir at law. Such a rule would violate every principle of evidence, as well as conduce to the perpetration of fraud. The effect of recitals in deeds, however, grows stronger as time progresses, and finally becomes conclusive, especially in those deeds which form a part of the chain of title. As at common law a deed forming a muniment of title more than thirty years old could be read in evidence without proof of its execution, on making the showing that the possession of the land it assumed to convey had gone along and been held in accordance with its provisions or that the instrument came from such custody as to afford a reasonable presumption of its genuineness and was other-

wise free from just ground of suspicion—so recitals in deeds were given authenticity when accompanied by a like showing. The rule had its foundation in the necessities of the case; for if strict proof of the execution of an ancient instrument were required in all cases, it is manifest that it would frequently cause a failure of justice.

The respondents seek to have the rule with respect to ancient deeds applied to the deed in question here, but we think it of too recent date to prove itself. It was executed in 1888, but little more than sixteen years before the commencement of this action, and there is nothing shown of the surrounding circumstances, save only lapse of time, which tends to prove the truth of its recitals. But sixteen years, where lapse of time alone is relied upon, is too short a period to raise a presumption that such recitals are true. So far from raising a presumption that the persons who have knowledge of the facts are dead, or that no probability exists that they could be found if living, the presumptions would be rather the other way; that is, there is a greater probability that some of these witnesses are still living and can be found than there is that they are all dead or have disappeared. Nor does a lapse of time so short furnish a presumption that the rights of adverse claimants, if any there are, are barred by the statute of limitations. In this case, for example, had there been a minor under the age of fourteen years at the time this deed was executed entitled to share in the property, his right to recover would not have been barred at the time this action was commenced, had sole and exclusive possession of the property been taken by the grantee named in the deed. But, without attempting to further elucidate the question, we are convinced that the court erred in holding that the respondent had shown such title in themselves as to warrant a judgment of ejectment against the appellants.

Since, however, the parties are before the court, the contro-

versy between them may as well be settled in this action as in another, and to permit it to be so settled we will not direct that the action be dismissed, but will direct that it be reversed, and remanded with instructions to grant leave to the parties to offer further evidence, provided they apply for such leave within thirty days after the remittitur from this court reaches the court below. If no such application is made, the cause will be dismissed without cost to either party. Neither party will recover costs in this court.

MOUNT, C. J., HADLEY, RUDKIN, CROW, DUNBAR, and ROOT, JJ., concur.

[No. 5477. Decided March 7, 1906.]

VAN R. PIERSON, *Respondent*, v. JOHN PEIRCE, *Appellant*.[1]

APPEAL AND ERROR—DISMISSAL—BONDS—AMOUNT OF SUPERSEDEAS BOND—MONEY JUDGMENT—INTERPLEADER. In an action of interpleader to recover a deposit in a bank, in which the money in controversy was deposited with the clerk of the court and judgment was entered ordering the clerk to pay it to the plaintiff, an appeal bond, conditioned also to effect a supersedeas, in a sum fixed by order of court, but less than double the amount of the judgment, is sufficient to give the supreme court jurisdiction of the appeal, inasmuch as it is for the recovery of specific personal property (overruling *Id.*, 37 Wash. 443).

CONTRACTS — PLEADINGS — INTERPLEADER — SUFFICIENCY OF COMPLAINT. In an action to recover a sum of money deposited in bank to be paid to the plaintiff upon the performance by him of a contract, a complaint setting up the contract, the performance thereof, and which states a cause of action against the bank is sufficient without amendment to state a cause of action against the other parties to the contract, who were required to interplead, upon the bank's disclaiming title and paying the money into court for the use of the parties entitled thereto.

CONTRACTS—EVIDENCE—VARYING WRITING BY PAROL. Where a written contract plainly recites that the first payment is to be deposited in a bank subject to the order of the first party, upon his part performance of a contract, and plainly advises the bank of its

[1]Reported in 84 Pac. 731.

duty in the premises as to the payment, oral evidence is inadmissible as to what was said at the time the contract and money were delivered to the bank.

CONTRACTS—RESCISSION—PERFORMANCE — EVIDENCE — SUFFICIENCY. There is sufficient evidence to support findings of fact to the effect that a contract for the sale of mining property had been performed by the vendor by offering a conveyance of sufficient title, where it appears that the vendees examined the papers, were perfectly satisfied, and took possession and worked the property until ordered out for failure to make payments due on the contract.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—BAD FAITH ON EXECUTION OF CONTRACT. In an action upon contract to recover a sum deposited by the vendees as a forfeit, on the failure to purchase mining property sold by the plaintiff, in which there was a finding in favor of the plaintiff, it is proper to deny a new trial on the ground of newly discovered evidence of bad faith in that the appellant first ascertained at the trial that his co-vendee was paid a commission on the sale, where there is no clear showing that the vendor sought to gain any advantage thereby or that the property was worth less than the purchase price, or that a different result would be probable on a new trial.

Appeal from a judgment of the superior court for King county, Bell, J., entered May 13, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, ordering the payment to the plaintiff of money in court, in an action of interpleader. Affirmed.

Jerold Landon Finch, for appellant.

W. E. Humphrey and *Edward Von Tobel,* for respondent.

MOUNT, C. J.—This action was brought against the First National Bank of Seattle, to recover the sum of $2,500, which was alleged to have been deposited with said bank to be paid to the plaintiff upon the failure of J. M. Starbuck and John Peirce to pay the purchase price of a mine which they had agreed to buy. The complaint set out the contract as follows:

"This agreement, made and entered into on this 19th day of March, 1902, by and between Van R. Pierson, of Seattle, Washington, party of the first part, and J. M. Starbuck and

John Peirce, parties of the second part, to wit: That party of the first part agrees to convey with good and sufficient title from the owners, all their right, title and interest in and to the lands, and all appurtenances thereunto belonging, now owned and operated by Messrs. F. Jacobson, John Eek and Reginald Talbot, held under lease from the British Crown, and commonly called and known as two placer claims of eighty acres each on the beach of Wreck Bay, on the west coast of Vancouver Island, B. C., said title to be placed in escrow with the First National Bank of Seattle, Washington, within thirty days from the date hereof, for the consideration of $35,000, on the following terms: $10,000 to be paid in cash within thirty days from the date of this agreement, and the remaining $25,000 to be paid from gold as taken from the property, equal to forty per cent of all the gold taken out, which is to be applied until the full amount of the purchase price is paid, when title papers are to pass to the party of the second part. Said party of the second part hereby agrees with the party of the first part upon the signing of these papers, to place in the First National Bank of Seattle, Washington, the sum of $2,500, which amount shall be subject to the order of the party of the first part upon delivering the above mentioned title papers as an escrow to the above named bank, the above named and mentioned $2,500 to be deducted from the first payment of $10,000, it being understood and agreed that if the second party fails to pay the full payment of $10,000 within the specified time, to wit, within thirty days from the date hereof, that the amount deposited shall be forfeited to the party of the first part. But if the party of the first part fails to deliver the title papers to the satisfaction of the party of the second part and complete the escrow, the $2,500 on deposit with the First National Bank shall be delivered to the party of the second part. It is hereby agreed that the parties of the second part shall faithfully and continuously work the property for at least six months each year until the full amount of the purchase price has been paid. And it is further agreed that if the party of the second part fails to do the work as required by the terms of the government lease, then the party of the first part shall have full power and privilege to carry on said work, and the party of the second part thereby forfeit all

right, title and interest in said property, and voids this contract, time being the essence of this agreement. Van R. Pierson, J. M. Starbuck, John Peirce.

"Witness: G. F. Turner."

The complaint alleged that the bank, with full knowledge of all the terms of the contract, accepted the deposit of $2,500, which it agreed to pay to the plaintiff as soon as plaintiff had performed his part of the contract, and upon the failure of Starbuck and Peirce to make the first payment as agreed. It then alleged performance on the part of the plaintiff, and the subsequent failure and refusal to perform on the part of Starbuck and Peirce, and alleged a demand for the money, and, also, that the owners of the mine had assigned all their interest in and to the $2,500 to the plaintiff, and prayed for the said sum of money.

The bank appeared in the action and filed an affidavit under the provisions of Bal. Code, § 4842, denying any claim to the money, and applied for an order of the court permitting the defendant bank to pay the money into court for the benefit of the parties which the court should find were entitled to it. An order was thereupon made, permitting the bank to pay the money to the clerk of the court and dismissing the bank from the case, and directing that a summons be served upon the said J. M. Starbuck and John Peirce, as substituted parties defendant. The bank then paid the money into court. These defendants Starbuck and Peirce thereupon voluntarily appeared in the action, without service of summons, and demurred to the complaint. Their demurrer was overruled. They then answered the complaint, denying all the allegations thereof, except the making of the contract, and alleged that the plaintiff failed to comply with the terms of the contract to be performed by him; that, after the time for conveying title had expired, as provided in the contract, they demanded from the bank the return of the $2,500, which demand was refused. The prayer of the answer was for an

order upon the clerk to pay the money to the substituted defendants.

On these issues, a trial was had to the court without a jury. Findings of fact were made in favor of the plaintiff, and a judgment was entered directing the clerk to pay the deposit of $2,500 over to the plaintiff. After a motion for a new trial was denied, the defendant Peirce appealed, and upon his application the court fixed the amount of a supersedeas bond at $500. The appellant gave a bond in the sum of $800, conditioned both as a stay and an appeal bond. Respondent moved this court to dismiss the appeal, upon the ground that the bond is insufficient to give the court jurisdiction. We heard the motion and, on March 11, 1905, filed an opinion dismissing the appeal upon the ground stated. *Pierson v. Peirce,* 37 Wash. 443, 79 Pac. 1003. Subsequently a petition for rehearing was filed and granted, and we now come to reconsider the case.

The question upon the motion to dismiss turns upon whether or not the judgment is one for money, within the meaning of the statute which provides that "the bond, where the appeal is from a final judgment for the recovery of money, shall be in a penalty double the amount of damages and costs recovered in such judgment, and in other cases shall be in such penalty not less than $200, . . . as a judge of the superior court shall prescribe." Bal. Code, § 6506. The judgment itself recites:

"It is ordered, adjudged and decreed that the said plaintiff is the owner and entitled to the possession of the said sum of $2,500, now in the possession of the clerk of this court, deposited in the above entitled case by the original defendant herein, the First National Bank of Seattle. It is further ordered and decreed that the substituted defendants have no interest whatever in said sum of $2,500. It is further ordered, adjudged and decreed that the clerk of this court pay over and deliver to the said plaintiff said sum of $2,500 now in his hands in this case."

The form of this judgment is the one ordinarily used for the recovery of specific personal property; but whatever may have been the form, we think the facts in the case show that the action was for the recovery of specific personal property, and the form of the judgment only goes to show how the court and the parties themselves viewed the character of the action. The confusion in the case arises by reason of the fact that the specific property sought to be recovered in the case is money. If the property had been any other character of personal property, it is clear that it would not be held to be a judgment for money, but would clearly be a judgment for the delivery of the property itself, and would fall within the provision of the statute denominated "other cases." The judgment did not command the defendants to pay money or damages, but directed the clerk in whose possession the money was to turn the same over to the plaintiff. A stay of the judgment merely left the money with the clerk, without the control or use by either of the parties to the action. If the judgment had been one against the defendants for the recovery of $2,500, without specifying any particular money, it would no doubt have been a "final judgment for the recovery of money," within the meaning of the statute; but where, as here, the judgment is an order against a third party to deliver a specific deposit in his possession, it must be treated as a judgment for the delivery of specific personal property, notwithstanding the property is in fact money. For these reasons we have concluded that we were mistaken in our former view where we held that the judgment was a judgment for the recovery of money. The motion to dismiss is therefore denied.

Upon the merits of the case, appellant contends that the complaint does not state a cause of action against the defendants interpleaded. But it certainly states a cause of action against the bank for the $2,500. The bank came into court and confessed that it had that amount of money which

did not belong to it, and which belonged either to the plaintiff or the defendants interpleaded, both of whom were demanding the money. It desired to pay the money, and did pay it into court for the party lawfully entitled to it. If the facts stated in the complaint were true, the plaintiff was entitled to the specific money which was brought into court, as well against the substituted defendants as against the bank. The complaint contained a plain and concise statement of the facts upon which plaintiff relied. The facts were stated in traversable form, which is all that is required. The fact that the money which plaintiff sought to recover from the bank was paid into court and was claimed by other parties did not require an amendment of the complaint, if the facts upon which plaintiff relied were the same against the substituted defendants as against the bank. It is clear that the facts were the same in this case. The plaintiff's title to the money depended upon the fulfillment of the terms of his contract. If those terms were complied with, plaintiff was authorized to receive the money, both as against the bank and against the defendants; otherwise not. This was the only question to be tried under the pleadings, and it was a very simple one. The complaint was sufficient, and the demurrer was properly overruled.

Appellant alleges error of the trial court in refusing oral evidence of what was said at the time the contract and money were deposited at the bank. The contract itself shows the purpose of it and was the best evidence of the object for which it was made. When the bank received the contract and the money accompanying it, and knew the contents of the contract, which were perfectly clear, it was clearly advised by the writing as to its duties in the premises, and oral evidence was therefore inadmissible to contradict or vary the terms of the written agreement. The testimony is clear that the bank understood from the written contract the intention of

the parties to the transaction. For this reason the offered evidence was properly rejected.

Appellant also contends that the court erred in making its findings of facts. While there is some dispute as to whether the defendants were satisfied with the papers showing the title to the mines, yet the evidence shows that appellant examined the papers and made inquiries as to the validity of the leases, and was apparently satisfied therewith, and took possession of the mines and continued in possession, until ordered out by respondent because of failure to make payment as provided in the agreement. There was also some evidence to the effect that the reason why the defendants did not comply with the contract was on account of an inability to make the first payment of $10,000 when it became due, and not because of any defect in the conveyance of title. The whole evidence convinces us that the findings made by the court were in accord with the facts.

Appellant alleges that the court erred in refusing a new trial. The motion for a new trial was based upon the fact that during the trial it first appeared that the plaintiff had agreed with the defendant Starbuck that he should be allowed a commission on the sale, if it should be consummated, but there is no clear showing that respondent sought to gain any advantage over the appellant in the transaction, or that the result of the case would probably be different on a new trial, or that the mining claims were not worth the full purchase price agreed upon. The mere fact that one of the defendants was to receive a commission on the sale was probably some evidence of bad faith between the defendants, but was insufficient to warrant a new trial.

We find no error in the record. The judgment is therefore affirmed.

CROW, HADLEY, FULLERTON, and ROOT, JJ., concur.

[No. 5929. Decided March 7, 1906.]

FRANK MOYNAHAN, *Relator, Plaintiff,* v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent.*[1]

EMINENT DOMAIN—NOTICE OF PROCEEDINGS—AFFIDAVIT FOR PUBLICATION. Under Bal. Code, § 5638, the affidavit, authorizing publication of notice to an owner whose residence is unknown, in proceedings for the condemnation of land, to be made by the agent or attorney of the corporation, need only shown that the residence of such owner is unknown to, or cannot be ascertained by, the "Deponent," and need not show that the same was unknown to the petitioner or any of its agents, officers or servants.

SAME—MOTION TO QUASH—RESIDENCE UNKNOWN—EVIDENCE—SUFFICIENCY. A motion to quash a service by publication, in condemnation proceedings, on the ground that the defendant's residence was known or could have been ascertained, is properly denied where it appears that diligent effort was made to ascertain the same, and that his house on the premises was boarded up, and none of his neighbors knew his actual residence.

Certiorari to review a judgment of the superior court for Spokane county, Huneke, J., entered September 28, 1905, adjudging a public use and public necessity for the condemnation of lands for a railroad, upon the default of the defendant. Affirmed.

Patrick C. Shine, Thomas M. Vance, and *Richardson, Roche & Onstine,* for relator.

Graves & Graves and *B. H. Kizer,* for respondent.

MOUNT, C. J.—This is a proceeding by writ of review, issued out of this court, upon the application of petitioner to review an order of the superior court of Spokane county, in an action to condemn certain lands for a right of way for railway purposes. The order sought to be reviewed is one adjudging the contemplated use of the lands a public use, and that the public interest requires the prosecution of the enterprise. Several errors are alleged, but the principal one

[1]Reported in 84 Pac. 655.

necessary for us to determine at this time is whether the court had jurisdiction to make the order.

The return of the writ shows that on July 15, 1905, the Spokane and Inland Railway Company, a corporation, commenced condemnation proceedings in the superior court of Spokane county, against relator and his alleged wife, to condemn a strip of land two hundred feet in width across the lands of the relator. On July 25, of the same year, B. H. Kizer, one of the attorneys for the railway company, made and filed an affidavit, averring that the residence of the Moynahans was unknown and, after diligent search and inquiry, could not be discovered. On July 27, 1905, the sheriff of Spokane county filed a return, attached to a notice as required by law, showing that he had received the notice on the 14th of July, 1905, for service upon the defendants, and after diligent search and inquiry he was unable to find the defendants, or either of them, in Spokane county; whereupon a copy of the notice was duly published as required by law. Afterwards, on August 9, 1905, proof of publication of the notice was filed.

On August 16, 1905, which was the date fixed in the notice for a hearing on the question of the public use and necessity for the land sought, the hearing was adjourned to August 26, 1905, and on that date, defendants not appearing, the court found that all the parties interested in the land had been duly served with notice, and adjudged a public use and the necessity for the taking, and set the hearing on the question of damages for September 20, 1905. On that day the relator appeared specially, and moved the court to quash the notice, upon the ground that the service was insufficient, and recited in his motion: "If the above motion is denied, then defendant moves the court for a continuance of said cause for a reasonable time to prepare for his defense." This motion was heard by the court upon the day it was filed. Affidavits were filed by both sides to the controversy, and

oral evidence was taken. After the hearing the court denied the motion to quash, but granted a continuance upon the question of the amount of damages, until September 26, 1905. Defendants then demanded a jury, which was denied. The cause was thereupon tried to the court upon the question of damages, both sides appearing and submitting evidence. The court made the award of damages and upon payment, a judgment of appropriation was entered. This writ was thereupon sued out to review the question of the jurisdiction of the court to make an order adjudging the use a public use.

The statute relating to service of notice is found in Bal. Code, § 5638, which provides:

"In all cases where the owner or person claiming an interest in such real or other property is a non-resident of this state, or where the residence of such owner or person is unknown, and an affidavit of the agent or attorney of the corporation shall be filed that such owner or person is a non-resident of this state, or that, after diligent inquiry, his residence is unknown, or cannot be ascertained by such deponent, service may be made by publication. . . . And such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown."

The return of the sheriff, and also the affidavit of the attorney, shows that extraordinary efforts were made to find the relator personally, and that inquiries had been made of neighbors and persons likely to know where he was and where he resided; but without success. Relator does not contend that the affidavit of the attorney does not strictly follow the statute, but he argues that the affidavit must show that the residence is unknown, not only to the attorney or deponent, but also to the party making the application for service; and in cases of corporations which acquire knowledge through agents, it must appear that the residence is unknown and cannot be discovered by any of the agents, officers, or servants of said corporation.

We cannot give such construction to the statute. In the first place, it permits an attorney to make the affidavit, and

only requires that he shall state that, after diligent inquiry, the residence is unknown to him, or cannot be ascertained by him. The words "by such deponent" refer both to the fact of unknown residence and to the fact that the residence cannot be ascertained. In the next place, the construction contended for by the relator would render the statute practically useless, because corporations usually have a large number of officers, agents and employees, and one agent or attorney could not swear that persons unknown to him had no knowledge of the residence of certain defendants. Unless the statute clearly required such unreasonable things, it would not be so construed.

On the facts shown at the hearing to quash the service of notice, we are clear that the court was right in denying the motion. The relator had a house upon the land, but the doors and windows were securely fastened, the windows being covered over with boards. He was away and had not been seen there for many months, and none of his neighbors or acquaintances knew anything about him or where he actually resided. It developed in the course of the proceedings that the relator was an unmarried man, and no one but himself was interested in the land. The relator himself does not state that he made the house his actual residence at the time or subsequent to the commencement of the action, and the inference from his own affidavit is that he had not done so for many months prior thereto.

We are satisfied that the court had jurisdiction to make the order complained of, and also that there is no error in the record. The order is therefore affirmed.

CROW, HADLEY, FULLERTON, RUDKIN, and ROOT, JJ., concur.

[No. 5725. Decided March 7, 1906.]

GEORGE WIEST, *Respondent*, v. COAL CREEK RAILROAD COMPANY, *Appellant*.[1]

PLEADINGS—COMPLAINT—DEMURRER. Where a complaint states a good cause of action, objection upon demurrer that it is not sufficiently specific is not available.

MASTER AND SERVANT — NEGLIGENCE — DEFECTIVE BRAKES — EVIDENCE—RELEVANCY. In a complaint for personal injuries which alleges that cars were equipped with poor, defective brakes, only one of which could be set upon a loaded car, it is relevant to ask a witness if there is anything about the brakes that would render them unsafe; also, if any of the brakes were broken at the time.

TRIAL—INSTRUCTIONS—STATING ISSUES. It is not error for the court in instructing the jury to state briefly the issues which had been made up by the pleadings.

MASTER AND SERVANT—NEGLIGENCE—DUTY OF MASTER—INSTRUCTIONS. In an action against an employer for personal injuries, instructions as to the duty or liability for failure to use due care, if it failed to do so, and if that caused the injury or directly contributed to it, are not objectionable or prejudicial to the defendant from the addition of the words "if you find that other causes contributed to it"; since it imposes no additional burden of proof upon the defendant.

MASTER AND SERVANT—WHEN RELATION EXISTS—LOAN OF SERVANT. Where an employer loans his servant to another for a particular service, the servant for anything done in that employment must be regarded as the servant of the one to whom he was loaned.

Appeal from a judgment of the superior court for Cowlitz county, Miller, J., entered December 2, 1904, upon the verdict of a jury rendered in favor of the plaintiff, for injuries sustained by a brakeman in the wreck of a logging train. Affirmed.

Ralph E. Moody, for appellant.

Coovert & Stapleton, for respondent.

[1]Reported in 84 Pac. 725.

DUNBAR, J.—The complaint in this case alleges, in substance, the corporate capacity of the defendant; that defendant owns and operates a railroad leading from Coal Creek slough to the logging camp of the Rue & Clyde Logging Company, in Cowlitz county, a distance of about two and one-half miles, hauling logs thereon, with engines and logging cars belonging to said defendant, from said logging camp to said Coal Creek slough; that on November 9, 1903, while plaintiff was in the employ of, and working for, said Rue & Clyde Logging Company, in its said logging camp, said company, by agreement with defendant, loaned plaintiff to defendant at defendant's request, for the purpose of acting and working on said defendant's logging train as a brakeman in making a trip on a train of logs from said camp to said Coal Creek slough, and that plaintiff so worked as a brakeman on said trip at the request of defendant and by defendant's license and permission and under its direction; that in making said trip the train consisted of five logging cars, heavily loaded with green logs, and in charge of Tom Allen, conductor and foreman of the defendant's crew; that plaintiff had no previous knowledge and experience as a brakeman upon a railroad train; that this was well known to defendant; that notwithstanding this, the defendant recklessly, carelessly and negligently gave plaintiff no instructions as such brakeman, or any warning of the danger and risk of such employment, though defendant well knew that its said railroad track, by reason of its heavy grades and defective equipment, was a peculiarly dangerous one, and that this was unknown to plaintiff; that defendant had constructed said railroad in a careless, negligent, and unworkmanlike manner, in that its grade was too steep for safety and its rails too light for logging railroad traffic or a heavy strain; and on said trip used a defective, old, and worn-out engine which was originally built for light, quick traffic, and which was not equipped

with good and sufficient brakes, and was not fitted for hauling so heavy a load, not properly geared and without whistle or bell, and without any means of signalling to brakeman or crew; and had so carelessly and negligently equipped said car with such poor defective brakes, and in such a manner, that only one brake to a car could be set when said car was loaded; and had negligently overloaded the said train, of which plaintiff had no knowledge; that said train, by reason thereof, got beyond control of its crew, and proceeded down the steep grade aforesaid at a terrific and unmanageable rate of speed, causing the entire train to leave the track and pile up in a disastrous wreck. The complaint proceeded to state that the plaintiff, realizing the uselessness of longer remaining upon the train, at the instance of the conductor Allen, jumped from the train, struck the bank, rolled down upon the track and had one of his feet cut off, and received other injuries; and asked damages in the sum of $20,500.

A demurrer was interposed to the complaint, which was overruled. The answer was a denial of the negligent acts alleged in the complaint, and an allegation that the defendant entered into a contract with the Rue & Clyde Logging Company, whereby the defendant was to transport the logs over its railroad from the logging camp of the said Rue & Clyde Logging Company to Coal Creek slough for a compensation, under which contract the Rue & Clyde Logging Company was to load the logs upon the cars of the defendant and have full charge and control of the loading of said cars, and that the only obligation of the defendant was to convey; alleged that the Rue & Clyde Logging Company did load the cars and train on the said 9th day of November, 1903, upon which the plaintiff alleges he was, and that the plaintiff was an employee of the said Rue & Clyde Logging Company at said date and time; alleged assumption of risk on the part of the plaintiff, and contributory negligence. Upon the completion of the respondent's testimony, motion for nonsuit was

made, which was overruled. Appellant introduced its testimony, rebutting the testimony which was introduced by the respondent. The jury was instructed, and returned a verdict in favor of respondent for $5,000.

The appellant in its brief presents twenty-eight assignments of error. While it is barely possible that, on the trial of a reasonably short case, twenty-eight reversible errors might occur, yet ordinarily where so many errors are assigned, it is an indication that no particular assignment of error is relied upon. The first error assigned is the action of the court in overruling the demurrer to the plaintiff's complaint. The appellant insists that the complaint is so general that it is not specific enough to be sufficient, and does not therefore state a cause of action. We think it is sufficient to say in relation to this assignment, that the complaint plainly states a good cause of action. This disposes of the second assignment, that the court erred in not sustaining the objection to the introduction of any testimony.

It is also alleged that the court erred in not sustaining defendant's objection to the question, "Was there anything about this brake, in operating it on that road in that manner, which would render it unsafe by reason of its position on the car, or its construction, or being difficult to get at, or any of those things?" Inasmuch as the allegations of the complaint were that the cars were equipped with poor, defective brakes, and were equipped in such a manner that only one brake to a car could be set when said cars were loaded, it would seem that the question was pertinent and directed to the proof of the allegations of the complaint. The next objection is that the court erred in not sustaining the defendant's objection to the question, "Were any of those brakes broken at that time?" This assignment may be classed with the one just above referred to. An examination of these alleged errors in relation to the introduction of testimony shows that they are without merit, and that no error was committed in

the introduction of testimony or in sustaining objections thereto.

Neither did the court err in denying defendant's motion for nonsuit, at the close of plaintiff's case, as there was testimony which, if not contradicted, would sustain the main allegations of the complaint. It is claimed that the court erred in giving the following instructions to the jury:

"The plaintiff charges that the defendant's railroad was constructed in a careless, negligent and unworkmanlike manner, in that its grade was too steep for safety for the operation of the train of the character of the one claimed to have been operated when the injury occurred; that the train on this occasion was too heavily loaded for the equipment to handle, and that the brakes on the cars were insufficient and out of repair."

It is alleged that the court erred in giving this instruction because it submitted to the jury issues upon which no evidence had been offered. The court in this particular was merely stating to the jury the issues which had been made up by the pleadings. The court if it had seen fit might have read the pleadings to the jury, or it might have stated them in a concise way as it did. And so far as the criticism is concerned, that it was an instruction upon which no evidence was offered, this cannot be maintained in view of what the record shows; and as to what the testimony was under the allegations of the complaint and answer, the court submitted that question to the jury.

The following instruction is also assigned as error:

"It was also the duty of the company to exercise ordinary care in keeping the brakes in repair. If the company had notice that the brakes were out of repair, or could have known it by the exercise of ordinary care, it was its duty to repair them so as to make them reasonably safe for the use intended, measured by the standard of ordinary care, and if it failed to so do, and this caused the injury or directly contributed to it (if you find that other causes contributed to it), then the company would be liable. But if the brakes were kept in

a reasonably safe condition for doing the work, or if the company exercised ordinary care in keeping the brakes in repair, then there would be no liability in this particular."

The objection to this instruction seems to be to the parenthetical clause, "if you find that other causes contributed to it." But, while it is a little difficult to understand what was intended by the interjection of that sentence, it is plain that it was not prejudicial to the appellant, as it imposed an additional burden of proof on the part of the respondent; because the court correctly stated the law that if it failed so to do—referring to its duty as expressed above—and this failure caused the injury or directly contributed to it, then the company would be liable, whether the jury found that other causes contributed to it or not. The most favorable construction in appellant's interest that could be put upon it would be that the jury were instructed that if they found by a preponderance of the evidence, etc., the failure of the defendant to exercise ordinary care, and that such failure caused the injury or directly contributed to it, then the defendant would be liable even though the jury should find that other causes might also have contributed to the injury. And this would have been a proper interpretation of the law. The same objection is raised in several subsequent assignments in regard to the instructions. The instructions as a whole were exceedingly fair and clear, and no possible prejudice could have attached to appellant's interest by reason thereof. The instructions asked for either had been given in substance or did not state the law.

It is also contended by the appellant that, under the circumstances shown by the pleadings and the proof, the respondent was a volunteer, and that he was in reality a servant of the Rue & Clyde Logging Company. But the law is well established that when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the ser-

vant of the man to whom he is lent, although he remains the general servant of the person who lent him. *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205; *Grace & Hyde Co. v. Probst*, 208 Ill. 147, 70 N. E. 12; *Consolidated Fireworks Co. v. Koehl*, 190 Ill. 145, 60 N. E. 87.

On the question of assumption of risk, under the allegations of the complaint and the proof in this case, the respondent had a right to rely upon the well-known duty of the employer to furnish him a safe place in which to work, and safe appliances to work with. The dangers were not so apparent that he was called upon to take notice of them and make an investigation. The case seems to be singularly free from errors. The cause was submitted to the jury under proper instructions, and the judgment is affirmed.

MOUNT, C. J., HADLEY, RUDKIN, CROW, and ROOT, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 5840. Decided March 7, 1906.]

THE CITY OF SPOKANE, *Respondent*, v. PETER COSTELLO *et al.*, *Appellants*.[1]

INDEMNITY—AGAINST JUDGMENT—EVIDENCE—OF PARTY AT TRIAL OF ORIGINAL ACTION—COMPETENCY—HARMLESS ERROR. In an action by a city upon the indemnity bond of a contractor to recover the amount of a judgment recovered against the city, the testimony of the plaintiff in the original action, who died since the trial thereof, is not competent as intrinsic evidence of any fact necessary to be shown outside of the record of the original action, to bind the person liable over to the city as the original judgment debtor; but the admission of such evidence for that purpose is not prejudicial where there is other uncontradicted competent evidence of the ultimate fact sought to be proved, which was admitted without objection.

EVIDENCE—OBJECTIONS—MOTION TO STRIKE. That part of the evidence of a witness is shown upon cross-examination to be derived from hearsay is not ground for striking the whole of the testimony,

[1]Reported in 84 Pac. 652.

and such a motion is properly overruled where some of the matters testified to were within the knowledge of the witness.

ACCORD AND SATISFACTION—PAYMENT TO CONTRACTOR PENDING SUIT FOR NEGLIGENCE. Where an action has been commenced against the city on account of the negligence of the contractor in failing to guard an excavation in a street, as required by his contract with the city, an accord and satisfaction by the city of any claim it may have against the contractor on account of such action is not shown by a settlement with the contractor for the amount due upon his contract for performing the above work, and the making by the city of final payment two months after the action against the city had been commenced.

PRINCIPAL AND SURETY—INDEMNITY—RELEASE BY PAYMENT TO CONTRACTOR PENDING SUIT—CONTRACTS—CONSTRUCTION. The making by a city of final payment to a contractor upon public work, two months after an action has been commenced against the city to recover for personal injuries sustained through the negligence of the contractor in failing to guard an excavation in the street, and the failure of the city to retain sufficient money to reimburse the city on account of such action, will not have the effect of releasing the surety upon the indemnity bond of the contractor guaranteeing the performance of his contract and saving the city harmless from such a judgment, where the city was not required by the contract to withhold any fixed sum, but the contract simply provided that the city could withhold such sum as the board of public works deemed necessary, and where there is no proof of fraud or collusion on the part of such board.

EVIDENCE—DUE PREPARATION FOR TRIAL—COMPETENCY. A motion for a new trial, filed in a certain action against the city, showing that the corporation counsel was alone familiar with the case, and had been suddenly taken ill, does not tend to show that the city had not made proper preparation for the trial, and is properly excluded when offered in evidence in a subsequent action for the purpose of proving such fact.

CONTINUANCE—RIGHT TO—INSTRUCTIONS. Upon an issue as to whether a person not a party to an action could have obtained a continuance of the trial, it is proper for the court to instruct that the granting of a continuance is largely discretionary, and may be exercised in favor of the real defendant, although not a party of record, when the requirements of justice demand it.

INTEREST—WHEN RECOVERABLE WITHOUT PLEADING. In an action to recover the amount of a judgment paid by an indemnified party, interest is recoverable from the date of the payment up to the time of the trial, although the complaint did not contain any demand for the interest, and the same may be properly included in the verdict.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered October 11, 1904, upon the verdict of a jury rendered in favor of the city, in an action upon a contractor's bond to recover the amount of a judgment recovered against and paid by the city. Affirmed.

Hamblen, Lund & Gilbert and *John A. Pierce,* for appellants.

Fred M. Dudley and *James M. Geraghty,* for respondent.

FULLERTON, J.—In September, 1901, one Philip Born recovered a judgment against the city of Spokane for personal injuries suffered, as he alleged, from a fall into an excavation made in a street of the city which the city had negligently allowed to remain unguarded or otherwise unprotected. The city appealed from the judgment, but the same was affirmed by this court. *Born v. Spokane,* 27 Wash. 719, 68 Pac. 386. After the case was remanded with instructions to carry the judgment into execution, the city paid the judgment, and thereupon instituted this action to recover the amount so paid from the appellants. The complaint of the city contained all the necessary averments to fix liability on the appellants. In brief, it charged that the excavation into which Born fell was dug by the appellant Costello, while in the performance of a contract he had with the city to improve the street on which the accident happened, and that he had, contrary to his contract with the city, negligently left the excavation unguarded and otherwise unprotected; further alleging that the appellant American Bonding & Trust Company was jointly liable with him, because it had executed its bond to the city, by the terms of which it expressly contracted to save the city harmless from any liability it might incur by reason of the negligence of Costello. Issue was taken on the complaint, and a trial entered upon in the course of which the court discharged the jury called to try the case and entered a judgment for the city.

This judgment was reversed by this court, on two grounds: first, because it did not appear in the proofs that the excavation into which Born fell was one made by Costello, and which it was his duty under his contract to guard; and second, that the notice served upon the appellants by the city, giving them notice of the pendency of the action by Born against it, was not served in time to constitute anything more than *prima facie* evidence of "due notice" called for by the contract, and that the court erred in refusing to permit the respondent to show that it was not served in time to enable them to prepare their defense. 33 Wash. 98, 74 Pac. 58. The case was again tried after its remand on the last mentioned appeal and again resulted in a judgment for the city. This appeal is from the judgment last entered.

The provisions of the contract and bond on which the city relies for a recovery are set out in the opinion of the court on the former appeal, and it is unnecessary to set them out again here. We shall proceed, therefore, to examine the assignments of error in the order in which they are argued in the brief of the appellants. On the trial, after showing that Philip Born, the plaintiff in the original case against the city, had died, the respondent offered in evidence certain parts of his testimony given on that trial for the purpose, as stated by counsel, of showing the particular place where he met with the accident, how the accident happened, and the condition of the lights and barriers at the place of the accident. To this the appellants objected on the ground that it was not competent for the purposes offered, as that trial was *res inter alios* and the testimony of witnesses given there could not be independent evidence against them on the trial. The trial court overruled the objection and permitted the evidence to be read. This ruling constitutes the first error assigned.

In *Washington Gas Light Co. v. District of Columbia,* 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, where the facts were similar to the case at bar, it was held that the testimony

of witnesses given on the original trial was admissible, along with the entire record, to prove the scope of the thing adjudged in the action in which it was given, but that such evidence possessed no intrinsic proving power, and was not competent to establish a fact necessary to be shown outside of the record to bind a person liable over to the original judgment debtor, even though such person had been given notice of the institution of the action in which the judgment was obtained, and had been requested to take upon himself the defense of it. Under the rule as announced here, it would seem that the evidence objected to was not competent for the purpose for which it was offered. As we said on the former appeal, the judgment roll in the *Born* case failed to show that the excavation into which the injured plaintiff fell was made by Costello, or was one against which he was bound under his contract to guard. This being a fact necessary to be established by evidence having intrinsic proving power, it was error to admit this evidence for that purpose, and reversible error, unless it clearly appears that it was not prejudicial. Passing to the latter inquiry, we are unable to see how the appellants were prejudiced by the evidence. The ultimate fact that it was intended to establish was shown later in the course of the trial by evidence against which no objection was made, or could have been successfully made; and, more than this, no attempt was made by the appellants to controvert the fact that the injury to Born was caused by an excavation which Costello was bound by the terms of his contract to guard against. This being true, it became one of the established facts of the case, and it was not error requiring reversal that incompetent evidence was introduced on the question. *Schwede v. Hemrich,* 29 Wash. 124, 69 Pac. 643; *Lownsdale v. Grays Harbor Boom Co.,* 36 Wash. 198, 78 Pac. 904; *Elster v. Seattle,* 18 Wash. 304, 51 Pac. 394; *Bell v. Spokane,* 30 Wash. 508, 71 Pac. 31.

It is next complained that the court refused to strike out

the evidence of the witness Latimer. This motion was properly overruled, because too broad. The witness plainly testified to some matters that were within his knowledge, and therefore competent, and it was not ground for striking out the whole of his evidence to show, on cross-examination, that a part of the matters testified to were derived from hearsay.

The third assignment is the refusal of the court to grant a nonsuit. This motion was based on the ground that the evidence was insufficient to sustain a verdict or judgment for the respondent. But, without setting out the evidence on which we base our conclusion, we have no hesitancy in saying that the verdict and judgment are sustained by competent evidence on all of the issues.

The contract between Costello and the city contained, among others, the following provisions:

"It is further agreed, that, if in the judgment of the board of public works it shall be necessary to retain a portion of the consideration to be paid by the first party to the second party after the completion of the work under this contract and its acceptance by the first party said first party may retain such amount as said board may deem necessary for such period after the completion and acceptance of said work and the fulfillment of this contract as it may determine. . . .

"Upon the full and complete performance of the terms and conditions of this contract by the party of the second part and the acceptance of the work to be done thereunder by the first party, the party of the first part agrees to pay to the said party of the second part the sum of four thousand dollars ($4,000) in the manner following, to wit, by issuing to the said second party its warrants drawn upon the 'Nora Avenue Improvement Fund, District Number One' in an aggregate amount equal to the total special assessments assessed to and levied upon the lots and parcels of real estate included in the assessment district created in said ordinance No. A 854, passed July 11, 1899, and by issuing to said party its warrants drawn on the general fund, or such other fund as may be hereafter designated by the city council, for the difference between the total amount of the assessments made

as aforesaid and the said sum of four thousand dollars ($4,000) provided that none of such warrants shall be issued until such time as shall be hereafter designated by the city council, and provided further that no warrants shall issue for any portion of the cost of said improvement which has been forfeited to or retained by the first party under the terms of this contract, until such time as the second party may become entitled thereto. Said second party hereby consents to the foregoing and agrees to accept payment for the performance of this contract as above provided."

It appeared from the evidence of the city that some two months after Born had begun his action against the city, it accepted the work done by Costello and paid him the balance due under his contract by drawing warrants on the funds therein specified. It is claimed by the appellants that the act of the city in accepting and paying for the work released both Costello and his bondsman from their obligation to respond to the judgment subsequently recovered by Born. In behalf of both of the appellants it is claimed that such acceptance and payment was a settlement of the matters between them, and that the city is now estopped to claim that the appellants are liable over to it for the judgment recovered by Born; and on behalf of the surety it is claimed that the failure of the city to retain from Costello a sufficient sum to satisfy any judgment Born might recover was a neglect to resort to a fund already in its hands in the very matter for which the appellant was surety, and its surrender constituted a release of the surety.

As to the first contention, the payment could be a defense only on the theory that it was an accord and satisfaction of all the differences between the parties; but plainly there was in this payment no accord and satisfaction. Before payment for the work done could be held to be an accord and satisfaction it would have to be shown that this liability was in contemplation of the parties at the time or that there was a purpose in making such payment to settle all of their mutual

differences. Doubtless the parties could have compromised their differences, and could have agreed that the payment of a certain sum from one to the other should be a final settlement between them of all of such differences; but that such an agreement was entered into is not to be inferred from the mere fact that a payment was made by the one to the other. Accord and satisfaction is a special contract, and must be alleged and proven like other special contracts.

The question of the release of the surety presented by the second branch of the contention is of more difficulty, but we think the ruling of the court was correct upon it also. The cases cited as maintaining the contrary doctrine are distinguishable from this case in the fact that the contracts there under consideration expressly made it the duty of the owner to withhold of the contract price a specific sum until final settlement between the parties, and the release of the surety was based on the fact that payment of the entire contract price had been made after the owner had notice that claims were made against his property for which the contractor was primarily liable. In other words, the payment was made in violation of the express terms of the contract. But here the facts are different. It will be noticed from the quotation made from the contract that the city was not required to withhold any fixed sum, but it is provided that "if in the judgment of the board of public works it shall be necessary to retain a portion" of the contract price the city may retain such amount as the board may deem necessary. The board of public works therefore was made by the contract the judge of the necessity of retaining any portion of the contract price, and their conclusion as to the necessity in any given case must bind the city and the surety alike, unless it be shown that there was fraud on the part of the board or collusion between it and the party in whose favor the decision was made. Neither fraud nor collusion was alleged or proven. The presumption therefore is that the board of public works acted in good faith and in accord with its best judgment in mak-

ing the final payment, and this being true, the surety cannot claim a discharge because of that act. *Mayor v. Brady,* 70 Hun 250, 24 N. Y. Supp. 296.

The fifth assignment of error is based on the ruling of the court refusing to admit in evidence an affidavit asking for a continuance, made and filed in the case of Born against the city of Spokane by A. H. Kenyon, assistant corporation counsel, at the time that case was called for trial. This was offered on the theory that it tended to support the appellants' contention that they had not received due notice of the pendency of the Born action; the argument being that it tended to show that the city had made no sufficient preparation for the trial of the cause, and for that reason a longer time than eleven days (the time between the notice and the day fixed for trial) was necessary to enable the appellants to prepare for trial. But the affidavit in no way supports the contention. As grounds for continuance, it recited that the corporation counsel had personally made the preparations for trial and was alone familiar with the facts of the case, and that he had been taken suddenly ill and was then confined to his bed, and a continuance was asked that he might take part in the trial. This, it is plain, in no way supports the claim that the city had not made sufficient preparation for the trial, and clearly had no probative force as evidence on that issue. It was not error, therefore, to reject it.

After the jury had been permitted to retire to consider of their verdict, it was found necessary to recall them for further instructions on a matter that had been inadvertently overlooked. After this had been concluded, a juror asked the court if it would have been possible for Costello to have secured a continuance of the *Born* case. The court inquired of counsel if there was any objection to his answering the question, and was answered negatively by counsel for both parties; the appellants, however, reserving the right to except to the answer if they deemed it incorrect. The court thereupon answered the question by making an abstract statement of

the law applicable to the granting of continuances. The appellants excepted to the instruction, and now say that the instruction was misleading, apparently for the reason that the appellants could not for any reason have obtained a continuance. But manifestly such is not the rule. The right of the trial court to grant a continuance, is largely discretionary, and may be exercised in favor of the real defendant although not a party to the record whenever the requirements of justice demand it; and the court did not err in assuming that the ordinary rules applicable thereto could have been invoked in that action by these appellants, had they attempted so to do.

The complaint did not contain a demand for interest on the sum paid by the city in satisfaction of the Born judgment. The jury, however, returned in their verdict interest at the legal rate from the time of payment up to the time of trial, and the judgment entered included that sum. The entering of judgment for this interest constitutes the last error assigned. On the question whether or not interest may be recovered without a specific demand therefor in the complaint, the authorities are not uniform, but in a number of states it is held that where interest is the legal consequence of the debt without express stipulation, it may be recovered although not demanded in the complaint; the rule being founded on the principle that interest in such cases is an incident of the debt and a demand for the debt is a demand for both principal and interest. This court has heretofore taken part with the cases holding interest recoverable in such cases, and we see no sufficient reason now to depart from the rule. *Edison General Elec. Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 36 Pac. 260, 40 Am. St. 910, 24 L. R. A. 315; *Tilden v. Gordon & Co.*, 34 Wash. 92, 74 Pac. 1016.

There being no reversible error in the record the judgment will stand affirmed.

MOUNT, C. J., HADLEY, RUDKIN, CROW, and DUNBAR, JJ., concur.

[No. 5883. Decided March 7, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. L. M. POOLE, *Appellant*.[1]

STATUTES—TITLE—SUFFICIENCY—CRIMINAL LAW—LIVING WITH A PROSTITUTE. The title to chapter 123 of the Laws of 1903, p. 230, with reference to living off the earnings of prostitutes, etc., fails to make any mention of anything relating to male persons who live with a prostitute, and is not sufficiently broad to cover a provision making such an act a misdemeanor, but such fact does not affect the balance of the act.

CRIMINAL LAW—LIVING OFF THE EARNINGS OF A PROSTITUTE—INSTRUCTIONS. In a prosecution for living off the earnings of a prostitute, it is not error prejudicial to the defendant for the court in its instructions to the jury, to impose upon the state the additional burden of proving that the defendant had lived with a prostitute, especially where the jury are expressly instructed that living with a prostitute would not constitute the offense charged.

CRIMINAL LAW—EVIDENCE—ADMISSIONS—SHOWING COMMISSION OF OTHER CRIMES. Admissions and confessions tending to show that the defendant was guilty of the crime charged, viz., living off the earnings of a prostitute, are not objectionable on the ground that they show the commission of other crimes, viz., vagrancy and larceny, when such fact appears only as an incident and because admissions were made during the progress of the prosecutions for such other offense.

SAME—VOLUNTARY CONFESSIONS. The confession of the accused made to officers while under arrest and during prosecutions for other offenses, are admissible, if voluntary and not made under the influence of fear produced by threats.

APPEAL — REVIEW — OBJECTIONS TO EVIDENCE — HARMLESS ERROR. Upon an assignment of error as to the admission of the evidence of a committing magistrate, in that he undertook to state the evidence of witnesses as to other offenses for which the defendant had been prosecuted, reversible error will not be found where it does not clearly appear that the witness undertook to testify to the testimony of such witnesses, and where no objection to the testimony was made on that ground.

Appeal from a judgment of the superior court for Spokane county, Warren, J., entered February 25, 1905, upon a trial

[1]Reported in 84 Pac. 727.

and conviction of the offense of living off the earnings of a prostitute. Affirmed.

Del Cary Smith and *George M. Ferris,* for appellant.

Richard M. Barnhart, A. J. Laughon, and *Fred C. Pugh,* for respondent.

DUNBAR, J.—The following is the information upon which appellant was convicted:

"That the said defendant, L. M. Poole, on the 23d day of January, 1905, in the county of Spokane, state of Washington, then and there being and then and there being a male person, did then and there wilfully, unlawfully and feloniously live with, live off of and accept the earnings of, and for a long time previous to said date had then and there been living with, and living off of, and accepting the earnings of one Freda Roberts, then and there being a female and a prostitute."

Appellant moved in the lower court to quash and set aside the information, which motion was overruled. He then demurred to the information, and the demurrer was likewise overruled. A plea of not guilty was then entered, trial was had, and a verdict of guilty was returned by the jury. After the rendition of the verdict, appellant moved to set aside the verdict and grant a new trial, upon the several grounds set forth in the motion. The motion was overruled, and appellant was sentenced to a term of five years in the penitentiary.

The errors assigned, that the court erred in denying appellant's motion to quash and set aside the information, and in overruling appellant's demurrer to the information, may be considered together, and are based upon the fact that the enactment of chapter 123,Laws 1903, page, 230, upon which the information is based, is obnoxious to article 2, § 19, of the state constitution, which provides that no bill shall embrace more than one subject, which shall be expressed in the title. The title is as follows:

"An act relating to husbands who connive at the prostitution of their wives and to persons who live off or accept the earnings of prostitutes, or solicit persons to go to houses of ill fame for immoral purposes, or who permit or solicit females under eighteen years of age to enter any house of ill-fame, or other houses for immoral purposes, declaring the violation hereof a felony and fixing a punishment."

It will be noted that in the title of the act there is no mention of anything relating to a male person who lives with a prostitute. This particular discrepancy between the act and the title has never heretofore been called to the attention of this court, and we are inclined to think that the title is not sufficiently broad to cover that provision of the act which relates to any male person who lives with a prostitute, and that therefore one cannot be indicted for that act.

But that, under the general and undisputed rule, does not destroy the validity of the remainder of the act, because it is not connected with the act, the title of which is omitted, in such a way as to embarrass in any manner the execution of the subsequent provisions. It is contended, however, by the appellant, who does not maintain that the balance of the act is rendered unconstitutional by the omission in the title which we have just mentioned, that the court instructed the jury that living with a prostitute was one of the material allegations of the information to be proven beyond a reasonable doubt, and that this was clearly error, as living with a prostitute is not a crime under the law on which the information is based, for the reason that the same is not embraced in the title of the act. We have carefully examined the instructions of the court and are unable to conceive that there was any prejudicial error in this respect. Instruction No. 3 is as follows:

"In order to find the defendant guilty of the crime charged, you must find beyond a reasonable doubt, that the defendant, L. M. Poole, did, upon the 23d day of January, 1905, in Spokane county, state of Washington, wilfully, unlawfully

and feloniously live off of and accept the earnings of and for a long time previous to said date had there been living with and living off of and accepting the earnings of one Freda Roberts, said Freda Roberts then and there being a female and a prostitute, and if you should entertain a reasonable doubt as to the truth of the allegations of said information, then it is your duty to give the defendant the benefit of said doubt, and to acquit him."

In this instruction the court imposed upon the state a greater burden than the law imposed, viz., the burden of proving, not only that the defendant had lived off of the earnings of Freda Roberts, but that he had for a long time previous to said date been living with her; and No. 4 is to the effect that it is not necessary for the state to prove both of these charges made in order to establish the offense charged (evidently referring to the living off of and accepting the earnings), "but if you should find from the evidence beyond a reasonable doubt that the defendant either lived off of or accepted the earnings of Freda Roberts, at the time and place charged, and that she was then and there a prostitute, then you should find the defendant guilty as charged in the information." So far, we think, there was nothing in the instructions of which the appellant could complain, although the state might justly have done so. But the court further on, in paragraphs 9 and 10, put this question beyond a peradventure by stating to the jury that the information was founded upon § 2 of an act of the legislature of 1903, which provides that any male person who lives with, or lives off of, in whole or in part, or accepts the earnings of a prostitute shall be deemed guilty of a felony. It then proceeds:

"The jury are further instructed that living with a prostitute as alleged in the information herein would not of itself render defendant guilty as charged in the information, but that if the jury should find from the evidence beyond a reasonable doubt that the defendant lived with a prostitute, but did not live off of or from her earnings, in whole or in part, or did not accept her earnings, in such an event the

jury could not find the defendant guilty, but on the other hand if you find from the evidence beyond a reasonable doubt that the defendant lived with a prostitute, and did live off from and upon her earnings in whole or in part, or did accept the earnings of such prostitute, if you should so find beyond a reasonable doubt, then your verdict should be guilty as charged."

So that it will be seen that the instruction, while erroneous under the theory that a portion of the act is unconstitutional, was error committed against the state and not against the appellant. We think the instructions as a whole fairly stated the law outside of the matter which we have just mentioned, and that no reversible error was committed, either in giving instructions or in refusing to give.

It is contended that the court erred in the admission of the testimony of William Shannon, as to statements made by appellant and Freda Roberts when appellant was under arrest charged with the crime of grand larceny, and under arrest and upon trial charged with vagrancy, prior to his arrest on the crime charged in the information herein; and also in the admission of the testimony of Captain Coverly and Chief Waller, under the same circumstances. The record shows that this was testimony showing admissions made by the appellant and conversations between him and Freda Roberts, which conversations and assertions on the part of Freda Roberts, admitted by the appellant, tended to show that the appellant had been living off of the earnings of the said Freda Roberts—earnings which had been acquired by the prosecution of her business as a prostitute.

The contention of the appellant is that in a prosecution for a particular offense, evidence tending to show the defendant guilty of other offenses not connected with the crime charged is reversible error, and many authorities are cited to sustain that contention. Among others upon which the appellant stoutly relies is *State v. Gottfreedson,* 24 Wash. 398, 64 Pac. 523. It is, no doubt, a well-established general

rule that the prosecution cannot prove the commission of another and distinct offense from that charged, for the purpose of rendering it more probable in the minds of the jury that the defendant committed the offense for which he was on trial; and this is the basis of the objection to all such testimony, viz., that it is an assault on the defendant's reputation, and that the jury is liable to convict him, not because there is testimony that he committed the crime with which he stands charged, but because he had committed other crimes.

But that was not the object of the testimony in this case. It was not intended to show that appellant had been convicted of the crime of vagrancy or grand larceny, with which he had been charged, and the mention of those trials was merely an incident, the confessions which he made having been made in the presence of the officers at the time of the prosecution of these aforementioned trials, viz., for vagrancy and larceny. They were admitted as testimony in the nature of confessions, not a confession of the crimes of which he stood chargeable at the time the confessions were made, but of the crime of which he now stands charged. And we think, under all authority, that such testimony is admissible; that it tended to prove the direct charge contained in the information; and that being true, it was competent evidence for that purpose, no matter where and under what circumstances the confessions were made, the only limitation being that they must be voluntarily made. Our code provides that the confession of the defendant made under inducement, with all the circumstances, may be given against him, except when made under the influence of fear, produced by threats. We held in *State v. Coss,* 12 Wash. 673, 42 Pac. 127, that such testimony was competent when there was nothing to show that the confession admitted was made under the influence of fear produced by threats; and in *State v. Hopkins,* 13 Wash. 5, 42 Pac. 627, it was said:

"The first ground of error alleged is that the court erred in permitting a witness to testify to what the appellant had

testified to in a civil action brought against him and others involving the property in question. It is contended that this was a violation of the constitutional rights of appellant on the ground that the testimony given by him in said action should be considered as given under duress, it being necessary to protect his rights therein. There is no claim that appellant was compelled by the court to testify to such matters upon the former trial; it was simply a matter of choice with him as to whether he would testify to the facts in the action brought against him or whether he would not do so, and the rule seems to be well settled by the weight of authority that such statements not given under compulsion may be put in evidence in a criminal proceeding against the party testifying."

Evidence of admissions of the accused is admissible where the jailor testifies that no inducements were held out to the accused, and that they were made in the presence of his wife when she was visiting him in the jail. *State v. Carpenter,* 32 Wash. 254, 73 Pac. 357. It is not error to receive as a voluntary confession evidence of statements made by an Indian before a committing magistrate, upon being charged with horse stealing, in answer to questions put by the magistrate, although he was not represented by counsel and was not informed of his right to refuse to answer. *State v. Washing,* 36 Wash. 485, 78 Pac. 1019.

In *State v. Royce,* 38 Wash. 111, 80 Pac. 268, we held that, in a prosecution for burglary, statements made by the accused to police officers who were investigating the matter of stolen property, made before any charges were preferred against the deceased, were not inadmissible as confessions induced by threats, when they were voluntarily made without threats or inducements on the part of the officers.

"Sworn testimony, which the defendant as a witness has voluntarily given in any cause or proceeding, civil or criminal,—for example, before a commissioner in bankruptcy, a committee of the legislature, committing magistrate, a grand jury, a coroner, a fire inquest, or any court in an ordinary law suit, or in the same court on a motion for continuance,—is, when pertinent to the issue, competent against him as an

admission or confession." 1 Bishop, New Crim. Proc., § 1255.

See, also, Starkey, Evidence, p. 51; *People v. Sexton,* 132 Cal. 37, 64 Pac. 107; *People v. Chrisman,* 135 Cal. 282, 67 Pac. 136. In fact, it is doubtful if any authority can be found to the contrary.

The appellant assigns error of the court in the admission of the testimony of J. D. Hinkle, police justice of Spokane, as to statements made by Freda Roberts and appellant in the trial of the action against appellant for vagrancy in the police court, proir to appellant's arrest upon the charge in this information. We are not able to determine from the record that the witness undertook to recite the testimony of Freda Roberts given in the police court. The question was,

"Now, you may state to the jury whether or not, on or about that date, you had a conversation with the defendant, or heard any conversation, or held any conversation with the defendant here in the presence of yourself, Captain Coverly, Chief of Police, in your office in the basement of the city hall."

This was objected to as incompetent, irrelevant and immaterial. The next question is, "Now, Judge, you may state to the jury, as near as you can recollect, what was said by this defendant on this occasion at your place with reference to his relation with the woman, Freda Roberts." And the witness proceeds to state what the defendant said, and in the course of the examination the following was interpolated:

"Mr. Smith: 'You were asked to say what he said.' 'Well, they both said the same thing, no material disagreement, both stated the same thing. I am telling what they both said.' "

Then the witness proceeded to state a conversation had, seemingly, between the appellant and Freda Roberts, but it does not plainly appear whether he was reciting testimony that they gave under oath or a conversation that they had in the presence of the officers. We conclude from the whole record

that the witness was not stating what Freda Roberts swore to, for the judge, a short time before, had refused on his own motion to allow another witness to state what Freda Roberts had testified to. In any event, the testimony was not objected to on the ground that the witness was relating the testimony of Freda Roberts, but on the general ground that it was an attempt to prove a separate offense, the same objection that was made where confessedly the confessions made were in a voluntary conversation between the defendant and said Freda Roberts, the objection finally being, "If your Honor please, I move to strike all the testimony of this witness. It goes to prove the commission of another and separate offense than that charged in the information, and that he was sitting at that time as a committing magistrate and passed upon the admissibility of the testimony given at that time." It not sufficiently appearing that the witness undertook to testify as to what Freda Roberts had said under oath, and there being no objection to the testimony on that score, the court does not feel justified in holding that there was any reversible error in the admission of the testimony of this witness.

A portion of appellants brief is devoted to the hardships of the law. This is a subject which the court is not at liberty to enter into, but which appropriately may be addressed to the legislature, whose province it is to make the laws. The court's duty is a narrower one—of construction alone. We have been unable to find any error in the admission or rejection of testimony, or any reversible error in any respect.

The judgment is affirmed.

MOUNT, C. J., RUDKIN, FULLERTON, HADLEY, CROW, and ROOT, JJ., concur.

[No. 5958. Decided March 8, 1906.]

CHILKAT GOLD & COPPER MINING COMPANY, *Respondent*, v. W. N. FOS *et al.*, *Appellants*.[1]

CORPORATIONS—STOCKHOLDERS—SALES AND TRANSFERS UNDER MISREPRESENTATIONS—RIGHTS OF COMPANY. Where certain shares of treasury stock in a mining corporation were issued in payment of services rendered and to be rendered in promoting and advertising the company, and the contract is thereafter fully performed by the stockholder, the stock is his property, and the fact that he sells the same under misrepresentations to the effect that the same is treasury stock and that the proceeds are to be used in the development of the mine, does not render him liable to account to the corporation as for sales of treasury stock belonging to the company or otherwise, since the misrepresentations did not concern the company or anyone except the vendees.

Appeal from a judgment of the superior court for King county, Bell., J., entered October 11, 1904, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action against a stockholder to recover the proceeds of the sales of stock. Reversed.

Will H. Thompson, for appellants.

Blaine, Tucker & Hyland, for respondent.

HADLEY, J.—The only question involved in this appeal is whether the conclusions of law and decree entered by the trial court properly follow from the facts as found. There is no statement of facts here, and the findings of facts, not being challenged, must be accepted as the facts in the case. We deem it unnecessary to make a formal statement of the issues, but will state the essential facts as the court found them, and then examine the conclusions of law and decree in the light of the facts found.

The facts are as follows: The plaintiff is a Washington corporation, and the defendants W. N. Fos and Charlotte M.

[1]Reported in 84 Pac. 827.

Fos are husband and wife. On the 14th day of April, 1903, at a regular meeting of the board of directors of the plaintiff corporation, the following resolution was passed by said board, and duly entered in the minutes of said meeting:

"Moved by J. H. DeBlondeau and seconded by Wilmon Tucker, that fifty thousand (50,000) shares of treasury stock be voted and the same is hereby voted to W. N. Fos for past services, and services in the future which he is to give toward financing the Chilkat Gold & Copper Mining Company and helping to place it in good business condition. It is expected that such financing will be accomplished on or before six months from this date. Carried unanimously, Messrs. Covert and DeBlondeau and Tucker, voting in favor of the same.

"Endorsed: This contract is hereby accepted. W. N. Fos."

Thereafter, on the same day, said fifty thousand shares of stock named in said resolution were issued to said W. N. Fos, and he, on the same day, duly assigned the certificate therefor to the said Charlotte M. Fos. Pursuant to said resolution, so accepted, the said W. N. Fos proceeded to carry out the agreement and purpose of the resolution, by preparing and publishing advertisements setting forth the advantages to investors to invest in said company. He aided and assisted in promoting and financing the company, and carried out upon his part the terms and conditions of said resolution and acceptance. Said W. N. Fos, acting as the agent of Charlotte M. Fos, caused said certificate for fifty thousand shares to be, from time to time, subdivided into other certificates, issued in blank, and placed the same in the hands of one Mrs. Kerwood, as an agent for the sale of the certificates, representing to her that the stock was treasury stock of the company, that she should sell the same at fifteen cents per share, and should receive as her commission twenty-five per cent of all sums received upon such sales, informing her that such moneys were to go into the treasury of the company for the purpose of developing the mines. Mrs. Kerwood so

received the certificates in blank, understood that they were certificates of the treasury stock of the company, and proceeded to sell them with the representation that they were such. From such sales there was returned to the said Foses, over and above commissions, the aggregate sum of $3,717.50, which amount they retained, and refused to deliver it to the treasury of the company. Thirty-three thousand of the fifty thousand shares are so sold, and there remain in the hands of Charlotte M. Fos seventeen thousand of such shares.

From the foregoing facts, the court entered as conclusions of law that the sale of the shares by Mrs. Kerwood, as agent, under the representation that the stock was treasury stock of the company, was such sale as now estops the Foses from claiming the proceeds thereof, and entitles the plaintiff to have the proceeds paid into its treasury. Furthermore, that if the Foses shall pay into the registry of the court, within ten days, the sum of $3,717.50, they shall be entitled to retain all of the stock now held by them, and the company shall issue to them, or their order, an amount of stock sufficient to make their total holdings from the treasury of the company fifty thousand shares; that in the event they shall not pay such sum into the registry of the court, then the plaintiff shall be entitled to surrender of the seventeen thousand shares of stock held by the defendants, and the same shall be returned to the treasury and cancelled. It is also found that plaintiff shall have judgment for said sum of $3,717.50. A decree in accordance with the above conclusions of law was entered, and the defendants have appealed.

We are unable to harmonize the conclusions of law with the facts as found. The facts show that the respondent company agreed to issue to appellant W. N. Fos the fifty thousand shares of treasury stock, in consideration for services already rendered, and for others to be thereafter rendered. It is also shown that he fully performed his agreement, which was the full consideration for the shares. The shares were issued by

the company to Fos, and the latter paid the agreed price. The stock, therefore, became his absolute property, and the respondent had no further ownership in it. Fos or his assignee had the right to sell it in the open market for whatever price it would bring. It is true, the court finds that there was a misrepresentation to the effect that this was still treasury stock, and that the proceeds of its sale would go into the treasury for use in developing the mines. Such a misrepresentation does not, however, concern the respondent. The thing sold belonged to appellants and not to respondent, and the latter can therefore have nothing to say about any negotiations or representations that may have led to the sale. Respondent once received from appellants its price for this property, and it must now stand aside and let them sell it to whom they please and upon their own terms. If they mislead their vendees, it is for the latter to object and not for respondent. No vendee or purchaser from appellants is here objecting to any statements or representations that have been made. So far as this record is concerned, they are satisfied. Upon the facts found, we think the conclusions of law and decree were clearly erroneous, and that respondent was not entitled to any relief.

The judgment is reversed, and the cause remanded, with instructions to vacate the judgment and decree, and dismiss the action.

MOUNT, C. J., FULLERTON, RUDKIN, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5986. Decided March 8, 1906.]

JOHN S. GRAHAM *et al.*, *Appellants*, v. ELIZA J. SMART *et al.*, *Respondents, and* J. W. WHEELER *et al.*, *Appellants.*[1]

MORTGAGES—FORECLOSURE —DETERMINATION OF PRIORITY OF LIENS. In an action to foreclose a mortgage the court has a right to determine the question of priority of liens upon the mortgaged property, depending upon the character of the property, whether separate or community, and it cannot be objected thereto that such decision would be litigating paramount title.

HUSBAND AND WIFE—SEPARATE JUDGMENT AGAINST WIFE—LIEN ON COMMUNITY PROPERTY—MORTGAGES—PRIORITY. A judgment against the wife reciting that it is her separate debt is not a lien upon the community real estate of the husband and wife, at least not until the levy of execution; and the husband cannot acquiesce in levy and sale of community property thereunder, as against mortgagees of the property prior in time to the issuance of such execution.

HUSBAND AND WIFE—COMMUNITY PROPERTY—EVIDENCE OF CHARACTER—SUFFICIENCY. Real property is shown to be the community property of husband and wife where the only witness examined was the husband, who testified that he had purchased the property after marriage, with community funds of himself and wife; and the admissions contained in the records in probate proceedings to which the husband and wife were not parties are not competent evidence against them.

EVIDENCE—AFFIDAVITS OF WITNESSES—IMPEACHMENT. The affidavit of a party made in an interlocutory proceeding is not competent evidence, except for impeaching his testimony after directing his attention thereto and giving him an opportunity to explain.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 10, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Byers & Byers, for appellants.

McCafferty & Bell, and *Hastings & Stedman,* for respondents.

[1]Reported in 84 Pac. 824.

RUDKIN, J.—On the 4th day of September, 1903, the defendant Wheeler obtained a judgment against the defendant Dell Merwin, in the superior court of King county, for the sum of $429.80. The judgment itself declared that it was the separate obligation of the defendant Dell Merwin, and should not in any manner constitute a charge or lien against the community property of the judgment debtor and W. K. Merwin, her husband. On the 2d day of February, 1904, the defendants Dell Merwin and W. K. Merwin, her husband, and the defendants Smart and Young, executed a mortgage to the plaintiffs' assignors, to secure the payment of the sum of $5,500, according to the terms and conditions of a promissory note bearing the same date.

On the 30th day of December, 1904, the defendant Wheeler caused an execution to issue on the above described judgment, and the defendant Smith, as sheriff of King county, by virtue of said execution, levied upon an undivided one-fourteenth interest in the property described in said mortgage, and offered the same for sale at public auction, as provided by law, on the 4th day of February, 1905, as the property of said Dell Merwin.

On the 3d day of February, 1905, the plaintiffs, as assignees of the note and mortgage above described, commenced this action for the foreclosure of the mortgage, and made the defendants Wheeler and Smith parties thereto, alleging that the above described judgment was the separate obligation of the defendant Dell Merwin, and that the property described in the mortgage was the community property of Dell Merwin and husband. The complaint prayed for a temporary injunction restraining the execution sale until the final hearing of the foreclosure suit, which was granted. At the final hearing, the court granted a decree of foreclosure, found that the judgment in question was the separate obligation of the defendant Dell Merwin, that the only interest Dell Merwin had in the mortgaged premises was the community property

of herself and husband, and perpetually enjoined the execution sale.

From this decree both the plaintiffs and the defendants Wheeler and Smith have appealed. The appeal of the plaintiffs, however, seems to have been abandoned, as we find no assignment of error in their behalf. The appellants Wheeler and Smith make the following contentions in support of their appeal: (1) That the claim under the judgment was superior and paramount to the mortgage lien, and its validity could not be adjudicated in the foreclosure suit; and (2) that the court erred in finding that the interest of Dell Merwin in the mortgaged premises was the community property of herself and husband.

In support of the first contention, the appellants cite *California etc. Trust Co. v. Cheney Electric etc. Co.*, 12 Wash. 138, 40 Pac. 732, and *Kizer v. Caufield*, 17 Wash. 417, 49 Pac. 1064, where it is held that a claim adverse to the mortgagor, and acquired prior to the execution of the mortgage, cannot be litigated in a suit to foreclose the mortgage. These decisions are not in point here, and we are not inclined to extend the rule there announced. In a suit to foreclose a mortgage or other lien, the court must determine the question of priority between different liens and claims (*Pennsylvania Mtg. Inv. Co. v. Gilbert*, 13 Wash. 684, 43 Pac. 941, 45 Pac. 43; *Johnson v. Irwin*, 16 Wash. 652, 48 Pac. 345); and for the purpose of determining the question before us, we must assume that the judgment was the separate obligation of the wife, and the mortgaged premises the community property of the judgment debtor and her husband. If this be true, the judgment was no lien or claim whatever against the mortgaged premises at the time of the execution of the mortgage. The husband might doubtless suffer the community property to be sold to satisfy the separate debt of the wife, but he could not do this as against his mortgagees. If this judgment ever became a lien or charge against the mortgaged premises as community property, it was not until the

levy was made under the execution, long after the execution of the mortgage. The question of priority between the two claims or liens depended upon the character of the property, whether separate or community, and the court had a right to determine that question in the foreclosure suit.

On the second question, we do not see how the court could have arrived at any other conclusion. The only witness examined at the trial was the defendant W. K. Merwin. He testified that he purchased the property after his marriage, with the community funds of himself and wife.

The appellants Wheeler and Smith offered in evidence, (1) the petition of Emma Young for the appointment of a guardian for the defendant Hazel Smart, signed by her attorney and verified by the petitioner; (2) a petition for leave to mortgage the real property of said minor, signed by her attorney; (3) an order authorizing the mortgage, and (4) an affidavit, signed by the defendant Eliza J. Smart and filed in the guardianship proceedings. Neither the plaintiffs nor the defendants Merwin and wife were parties to these probate proceedings, and we see no ground upon which these petitions, orders, and affidavits were admissible or competent. In so far as any adjudication was made by the court in that proceeding, it was *res inter alios acta*. In so far as the petitions and affidavits contained admissions, they could only bind the parties who made them. 2 Wigmore, Evidence, § 1076; *Dan v. Brown*, 4 Cowen 483; *Leeds v. The Marine Ins. Co.*, 2 Wheat. 380.

Counsel for appellants also call attention to an affidavit made by the witness Merwin, on the motion to dissolve the temporary restraining order. Counsel for the plaintiffs maintain that this affidavit is not properly before us, but we need not determine that question. The affidavit would only be competent for the purpose of impeaching the witness, and it was not so offered. The attention of the witness was not directed to its contents, and he was given no opportunity to explain it. An inspection of the document shows so plainly

that the word "not" was inadvertently omitted in its preparation that the court properly disregarded it.

There is no error in the record, and the judgment is affirmed.

MOUNT, C. J., ROOT, CROW, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

[No. 6040. Decided March 8, 1906.]

ALBERT LILIENTHAL *et al., Appellants,* v. HUGH HERREN, *Respondent.*[1]

FRAUD—CONTRACTS—PLEADINGS—SPECIFIC STATEMENT OF FACTS. In an action upon a written contract for the sale of hops, an answer alleging that the plaintiffs, by mistake or with intent to deceive defendant, inserted an erroneous description in the contract and induced the defendants to sign the same, representing that it contained the agreement of the parties, is a sufficiently specific allegation of the facts constituting fraud, and is a valid defense to the action.

CONTRACTS—PAROL EVIDENCE TO VARY WRITING—FRAUD. Evidence of conversations prior to the making of a written contract is admissible to vary or change the terms of the writing where it was received for the purpose of showing fraud in drawing up the contract and stating the terms agreed upon.

CONTRACTS—SALE OF HOPS—MISTAKE OR FRAUD—EVIDENCE—SUFFICIENCY. In an action on a contract for the sale of hops to be grown by the defendant on two certain tracts of land containing ten and twenty acres respectively, the evidence sufficiently shows that the defendant signed the contract through the mistake or fraud of the plaintiffs in drawing up the contract, and that he was not liable thereunder, where it appears that the defendant, to the knowledge of the plaintiffs, had already sold the hops on the twenty-acre tract at the same price and to another firm of buyers, that the contract was an involved one, and that the defendant had confidence in the agent of the plaintiffs, and asked if the contract contained the terms of the agreement, which in fact was confined to the ten-acre tract, and that he was informed by the agent that it did, and that he signed the contract without reading it, relying upon such representations.

[1]Reported in 84 Pac. 829.

Appeal from a judgment of the superior court for Pierce county, Linn, J., entered July 25, 1905, upon the special verdict of a jury rendered in favor of the defendant, and in favor of the plaintiffs for a sum admitted to be due by direction of the court, in an action on a contract. Affirmed.

H. G. & Dix H. Rowland, for appellants.

George W. Fogg and *Ellis & Fletcher,* for respondent.

MOUNT, C. J.—This action was brought by the appellants, plaintiffs below, to recover damages against respondent for an alleged breach of a written contract. The complaint sets out the contract, by the terms of which respondent agreed to sell and deliver to the appellants twenty thousand pounds of hops, for an agreed price of fifteen cents per pound, to be grown in the year 1904 on a certain farm containing three hundred and twenty acres of land, and agreed to advance to respondent $600 at the date of the contract, and $1,000 more at picking season. The complaint then alleged, that appellants advanced the said sums as agreed; that respondent raised more hops than necessary to comply with the contract, but that he delivered only nine thousand eight hundred and sixty-eight pounds, and refused to deliver the balance; that the advances made exceeded the price of the hops delivered by the sum of $119.80; that appellants were damaged in the sum of $1,519.80 for hops which respondent agreed but failed to deliver, and $119.80 which was overpaid for those delivered, and prayed for judgment for $1,639.60.

The answer of respondent admitted the signing and delivery of the writing sued upon, but denied that said writing was the contract of the parties, and admitted that respondent raised more than twenty thousand pounds of hops on the said three hundred and twenty acres of land during the year 1904, and that he delivered only nine thousand eight hundred and sixty-eight pounds of hops to the appellants; that appellants made the advancement as alleged, which amounted

to $119.80 more than the purchase price of the hops delivered. As an affirmative defense, the answer alleged, in substance, that respondent was occupying under lease the "Carson farm," consisting of three hundred and twenty acres of land, thirty acres of which were planted to hops, twenty acres of the thirty being in one yard and ten acres in the other; that the hops to be grown on the twenty-acre yard for the year 1904, to the extent of forty thousand pounds, had been previously sold to Peer Brothers, at fifteen cents per pound; that the appellants had full knowledge of said sale; that appellants' agents solicited the purchase of the hops to be grown on the ten-acre yard for the year 1904, and whatever surplus there might be on the twenty-acre yard over the forty thousand pounds, which had been sold to the said Peer Brothers, at fifteen cents per pound; that respondent agreed to sell the same at that price to appellants upon the terms stated in the written contract; that appellants' agents undertook to reduce the agreement to writing, and by fraud or mistake the contract was drawn to include all hops grown on the whole three hundred and twenty acres; that respondent did not agree to sell the hops which had already been sold, and did not intend to sign a contract for the hops growing on the twenty-acre yard, and that the said written contract was signed by mistake on his part and without knowledge of the fact that it required him to sell to the appellants the hops which were grown on the twenty-acre yard, and that the contract was drawn so as to include the twenty-acre yard by mistake or fraud on appellants' part; that appellants represented that the contract as drawn was as agreed upon, and respondent, relying upon said representation, signed the same; that respondent had no copy of the contract, and did not know until this action was brought that appellants claimed to have purchased the hops grown on the twenty-acre yard; that all the hops grown on the twenty-acre yard were less than forty thousand pounds, and were all delivered to Peer Brothers, under their contract with respondent, and that all the hops

grown on the ten-acre yard were delivered to appellants under the contract sued upon.

It will not be necessary to notice other separate defenses. A reply denied all the allegations of the answer. Upon the trial, to the court and a jury, a verdict was returned in favor of the appellants, by direction of the court, for $119.80, admitted by the answer to be owing from respondent to the appellants. The jury also returned special findings as follows:

"Q. Did plaintiffs or their agents induce defendant to sign said contract by misrepresentation or fraud? Ans. Yes, by misrepresentation. Q. Did plaintiffs or their agents at the time of signing the contract sued upon mislead defendant as to the contents of the contract, and did defendant at the signing of the contract do so relying upon representations made by plaintiffs or their agents? Ans. Yes."

Appellants contend that the allegations of fraud contained in the answer are general and, therefore, raise no issue upon which evidence could be introduced. The rule is that general allegations of fraud are insufficient. The facts must be set out specifically, so that the person accused of fraud may know just what he is required to meet in order to refute the charges. 9 Ency. Plead. & Prac., p. 686; Bump, Fraudulent Conveyances (4th ed.), § 560. The facts constituting fraud are alleged in the answer, viz., that the appellants, by mistake or intending to deceive the respondent, inserted in the written contract a description of the whole three hundred and twenty acres of land, and induced respondent to sign the same, representing that it contained the agreement, when only ten acres was agreed upon; and thereby including in the contract, without notice to respondent, land not agreed or intended to be included. This was not a general allegation of fraud. It was a statement of the specific facts relied upon and, if true, invalidated the contract. The answer was therefore sufficient to constitute a defense upon the ground of fraud.

Appellants contend further that the court erred in receiv-

ing evidence of conversations prior to the making of the contract, which evidence had the effect to contradict or vary the terms of the contract. This is the general rule, where the contract is in writing and where a party seeks to avoid or change the terms of it and no fraud is alleged. But,

"The fact that a contract has been reduced to writing, or that there are written warranties, is no ground for excluding parol evidence that one of the parties was induced to enter into the same by false and fraudulent representations of the other, though the writing is silent on the subject to which the representations relate; for it is a well-settled exception to the general rule excluding parol evidence to vary or change a written contract, that such evidence may be received for the purpose of showing fraud." 14 Am. & Eng. Ency. Law (2d ed.), p. 199, and cases cited.

It was conclusively shown in this case that the respondent had previously sold the hops to be grown on twenty acres of the land, to the amount of forty thousand pounds, at fifteen cents per pound, to a firm by the name of Peer Brothers, and had entered into a written contract of sale therefor with said Peer Brothers, and that the appellants knew about this sale prior to the time they sought to make the contract sued upon. There is no dispute of these facts. Nothing was to be gained by the respondent in agreeing to sell the same hops to the appellants at the same price they had already been sold for, and it is inconceivable that respondent would knowingly place himself in a position where he would be certain to respond in damages to one or the other of the two parties, and where he could reap no possible benefit from the second contract of sale of the twenty-acre yard. It is true that the respondent could read, and that the written contract was handed to him with the request that he read it, and he did glance over it hurriedly and without reading it carefully; but he testified that he was well acquainted with the agents of appellants, that he had worked for them, and he relied upon them, and that he asked them if the contract was in accordance with his memorandum agreement and

was assured that it was, and he thereupon signed it relying solely upon the statement of appellants' agents that the contract was all right. The contract is long and involved. It covers five pages of typewritten matter, and it is doubtful if any person not accustomed to legal documents would fully comprehend its meaning without very careful study.

Even if respondent had read the contract, we doubt if he could have discovered that it conveyed hops already sold, because it does not recite that he shall deliver all the hops to be grown on the thirty acres planted to hops, but recites "the seller does hereby bargain and sell unto the buyers, and does hereby agree to deliver . . . twenty thousand pounds net of that certain crop of hops to be cultivated and produced by the seller as aforesaid on said land during the year 1904." Another section of the contract provides: "If the seller be unable to perform this contract by reason of an unfavorable season or seasons, he shall not be liable in damages hereunder except to repay all advances made to him or them by the buyers with interest thereon as herein provided." And respondent testified that, when he signed the contract, he told the appellants' agents that the ten acres might not produce the amount of twenty housand pounds of hops, and that they then referred to this clause of the contract and read it to him, and stated that it absolved him from any liability except for the amount of money advanced or the hops grown on the ten acres of land. Under these circumstances, we think the respondent had a right to rely upon the representations of the appellants' agents as to what the contract contained. It was shown without contradiction, that the appellants received all the hops grown on the ten acres of land; that Peer Brothers received all that were grown on the twenty acres in the other yard, which they had purchased, and that there were not enough hops grown on either yard to fill the full amount required by either contract; that appellants' agents knew of the fact that respondent was delivering the hops from the twenty-acre yard to Peer Brothers as

they were being picked, and made no objection thereto. Under these circumstances the facts as found by the jury and approved by the court were correct.

The judgment was right. It is therefore affirmed.

ROOT, CROW, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

[No. 6025. Decided March 9, 1906.]

GEORGE T. BACON, *Appellant,* v. W. F. LOCKE, *as Constable, Respondent.*[1]

CONSTITUTIONAL LAW—COMMERCE—DISCRIMINATION AGAINST CITIZENS OF OTHER STATES. Laws 1905, p. 372, providing that every person who canvasses or sells by sample certain specified articles "after shipment to the state," shall pay in advance a license fee of $200 per year, violates the state and Federal restrictions against discrimination between citizens of this and other states, and is unconstitutional.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered July 29, 1905, denying a petition for a writ of habeas corpus, by one convicted of peddling and canvassing without a license. Reversed.

Rose & Craven, for appellant.

Virgil Peringer, for respondent.

ROOT, J.—Appellant was arrested upon a complaint charging him with the crime of peddling and canvassing without a license, in violation of an act of the legislature approved March 14, 1905, and found at pages 372, 373 of the published laws of 1905. He filed a petition for his release upon a writ of habeas corpus, which petition and application was, by the honorable superior court, denied. From this order and judgment he appeals to this court.

It is his contention that the statute in question is in conflict with certain provisions of the constitution of the United

[1]Reported in 83 Pac. 721.

States and of this state. That portion of the statute involved herein reads as follows:

"That every person, firm or corporation who peddles out, or, after shipment to the state, canvasses and sells by sample to users or consumers, clocks, agricultural implements or machinery, stoves, ranges, windmills, lightning rods, wagons, buggies, carriages, surreys, and other similar vehicles, washing machines, sewing machines, churns, or groceries shall pay in advance a license tax of two hundred dollars ($200) for each calendar year, or portion thereof, to be paid in each county in which said occupation is pursued."

Appellant was agent of the Spaulding Manufacturing Company, whose factory is located at Grinnell, in the state of Iowa. On the 3d of July, 1905, he sold to Julius Shields in Whatcom county, as per sample then exhibited, a carriage or wagon, taking his order for the same, and afterwards on the 5th of July delivering the wagon thus sold, said wagon being taken from the warehouse of the Spaulding company, in said county, where it had a carload lot of carriages or wagons stored. It is urged by appellant that this statute discriminates against goods manufactured in other states, and consequently against the owners of said goods and their agents. Section 8, art. 1, of the United States constitution contains the following:

"The congress shall have power, . . . to regulate commerce with foreign nations and among the several states and with Indian tribes."

Section 2 of art. 4 contains the following:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Section 1 of the Fourteenth Amendment reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 12 of art. 1 of the state constitution reads as follows:

"No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

We think appellant's contention must be upheld. The clause "after shipment to the state," has the effect of discriminating between goods manufactured in this state and those shipped here from a sister commonwealth. To avoid this, was one of the prime purposes of the constitutional provisions hereinbefore quoted; and the decisions of the United States supreme court, as we understand them, have announced principles which, applied to this statute, would render it clearly obnoxious to the Federal constitution. *Webber v. Virginia,* 103 U. S. 344, 26 L. Ed. 565; *Brennan v. Titusville,* 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Woodruff v. Parham,* 75 U. S. 123, 19 L. Ed. 382; *Welton v. Missouri,* 91 U. S. 275, 23 L. Ed. 347; *Brown v. Maryland,* 12 Wheat. 446, 6 L. Ed. 688; *Ex parte Deeds* (Ark.), 87 S. W. 1030; *Brown v. Houston,* 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Howe Machine Co. v. Gage,* 100 U. S. 676, 25 L. Ed. 754; *Emert v. Missouri,* 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; *Walling v. Michigan,* 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691; *Ward v. Maryland,* 79 U. S. 418, 20 L. Ed. 449; *Robbins v. Shelby County Taxing Dist.,* 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694.

In the case of *Webber v. Virginia,* 103 U. S. 344, 26 L. Ed. 565, the supreme court, speaking through Mr. Justice Field, said:

"By these sections, read together, we have this result: the agent for the sale of articles manufactured in other states must first obtain a license to sell, for which he is required to

pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the state, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other states. Sales by manufacturers are chiefly effected through agents. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the state, it is to that extent a regulation of commerce in the articles between the states. It matters not whether the tax be laid directly upon the articles sold or in the form of licenses for their sale. If by reason of their foreign character the state can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states. . . . Commerce among the states in any commodity can only be free when the commodity is exempted from all discriminating regulations and burdens imposed by local authority by reason of its foreign growth or manufacture."

In *Robbins v. Shelby County Taxing Dist., supra,* at page 497, the supreme court, speaking by Mr. Justice Bradley, employs this language:

"When goods are sent from one state to another for sale, or, in consequence of a sale, they become part of its general property, and amenable to its laws; provided that no discrimination be made against them *as* goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. *Brown v. Huston, qua supra; Machine Co. v. Gage,* 100 U. S. 676. But to tax the sale of such goods, or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself."

In the case of *Brennan v. Titusville, supra,* at page 302, the court, speaking by Mr. Justice Brewer, announced the following:

"It is undoubtedly true that there are many police regulations which do not affect interstate commerce, but which have been and will be sustained as clearly within the power of the state; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of congress, and that the silence of congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.

"That this license tax is a direct burden on interstate commerce is not open to question. In the early and leading case of *Brown v. Maryland,* 12 Wheat. 419, 444, in which a state law requiring an importer to take out a license and pay $50 before he should be permitted to sell a package of imported goods, was adjudged in conflict with the commerce clause in the national Constitution, Chief Justice Marshall said: 'But should it be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is not a tax upon the article, but on the person. The state, it is said, may tax occupations, and this is nothing more. It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself.' "

In the case of *Machine Company v. Gage,* 100 U. S. 676, 25 L. Ed. 754, the court, through Mr. Justice Swayne, spoke as follows:

"A law which requires a license to be taken out by peddlers who sell articles not produced in the state, and requires no such license with respect to those who sell in the same way articles which are produced in the state, is in conflict with the power of Congress to regulate commerce with foreign nations and among the several states."

It would seem that the citation just made is so applicable to the case at bar as to render it absolutely conclusive of the question involved.

In *Welton v. Missouri,* 91 U. S. 275, 23 L. Ed. 347, the supreme court used this language:

"Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the state to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

In an elaborate note to *People v. Wemple,* 27 Am. St. 542, 561, Mr. Freeman lays down the rule as follows:

"A state may exact a license fee from persons carrying on business within its territory, without rendering its action in so doing subject to the objection that it is attempting to regulate interstate or foreign commerce, provided it does not discriminate in favor of its people, products, or manufactures, nor charge persons importing articles of commerce within the state for the privilege of there disposing of them."

Respondent contends with much ability and ingenuity that the language of this statute may be so construed as to avoid constitutional objections. He contends that the phrase "after shipment to the state" refers to persons and not to property; and also that it is susceptible of the construction that would express an intention that nonresidents who send their agents into this state simply to canvass and take orders for their principals are excepted from the requirements of the statute, and that no others are excepted. We are unable to recognize force in these contentions. The language is not obscure or ambiguous, and we cannot give to it a significance strained and unnatural. Sutherland, Stat. Constr., §§ 235, 237, and 238; *McClusky v. Cromwell,* 11 N. Y. 593. The effect of the usual and ordinary meaning of the language employed in the

statute being to require of a canvasser a license when selling goods shipped from a sister state to this, but not imposing a like obligation upon one canvassing for goods manufactured in this state, we are constrained to hold the statute inhibited by the Federal constitution.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to grant the writ and release the appellant.

MOUNT, C. J., CROW, RUDKIN, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5933. Decided March 9, 1906.]

DEXTER HORTON & Co., BANKERS, *Appellant*, v. J. J. McCAFFERTY, *Respondent*.[1]

PLEDGE — STOCK IN CORPORATIONS — WHETHER RELEASED BY REORGANIZATION—CONSENT OF PLEDGEE—NOTICE. Where all the interests of a stockholder in a corporation, stock issued as well as stock to be thereafter issued, was pledged by him as security for a debt, and a reorganization of the corporation is effected whereby each of the stockholders is to receive a corresponding interest in a new corporation, the pledge cannot be released without the consent of the pledgee; and where the pledgee refused to release any of the debtor's interest (save certain shares), and certain shares in the new corporation are at the direction of the debtor, issued and pledged to the pledgee as security for a new note representing the same indebtedness, the pledge as to such shares is a continuous one, and is not affected by an attempted prior assignment by the debtor of a portion of such shares to another who had notice of the lien of the pledgee.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 19, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to foreclose a pledge of corporate stock. Reversed.

[1]Reported in 84 Pac. 733.

Peters & Powell, for appellant.

McCafferty & Bell, for respondent.

HADLEY, J.—This action was brought to foreclose a pledge of twelve thousand shares of the capital stock of the Spruce Creek Power Company, Ltd., a corporation of British Columbia. The plaintiff alleges that the said number of shares were pledged to it by the defendant Brook, to secure the payment of his note to the plaintiff for $4,793.11. No appearance was made by the defendant Brook, but the defendant McCafferty appeared and answered that, prior to the execution of the said note and pledge by Brook, he—McCafferty—was the owner in his own right of seventeen hundred and sixty-three shares of the stock referred to in the collateral written agreement by which the stock was pledged; that prior to the execution and delivery of the note and collateral agreement, he notified the plaintiff that said seventeen hundred and sixty-three shares were his property, and that Brook had no right or authority to pledge them. The complaint asks for foreclosure upon the whole of the twelve thousand shares, and the answer asks judgment that the defendant McCafferty is the owner of seventeen hundred and sixty-three of said shares, free and clear of any lien in favor of plaintiff.

The cause was tried by the court without a jury, and a decree was entered awarding judgment to the plaintiff and against Brook for the full amount of the note, and decreeing foreclosure against ten thousand two hundred and thirty-seven shares of the stock. The decree also declared that the remainder of the pledged stock is the property of defendant McCafferty, free and clear of any lien in favor of plaintiff. It is also provided in the decree that the plaintiff shall deliver said seventeen hundred and sixty-three shares to McCafferty within five days of its entry, and that, in the event of failure to do so, McCafferty shall have judgment against plaintiff for $1,763. Plaintiff has appealed.

The evidence is substantially to the following effect: Prior

to the execution of the note and pledge in suit, said Brook became indebted to appellant. He was then interested in the Consolidated Spruce Creek Placers, Ltd., a Washington corporation, which for convenience may be designated as the "old company." As the holder of the property upon which the involved stock is based, said company was the predecessor in interest of the Spruce Creek Power Company, Ltd., above mentioned, which latter corporation may be designated as the "new company." To secure his indebtedness to appellant, Brook had pledged to it all of his shares of stock in the old company, then issued, and stock to be thereafter issued, as representing any interest of himself in the property of the old company for which stock had not already issued to him. Afterwards a suit was brought upon said indebtedness, and to foreclose the lien upon all of Brook's stock and interest in the old company.

In that case a writ of garnishment was issued and directed to the old company, for the purpose of subjecting to the payment of the debt any unissued stock in the old company to which Brook was entitled, and any indebtedness owing him from the old company. The respondent represented Brook as his counsel in that action, and the debt sued upon there was the same indebtedness evidenced by a different note as that sued upon here. During the pendency of that action, a reorganization of the old company was effected with the consent of all of its stockholders, whereby the new company was organized and took over all the property of the old company. The stockholders exchanged their interests in the old company for shares of stock in the new one. Under the plan of reorganization, the amount of stock in the new company, representing Brook's entire interest in the property of the old one, was sixteen thousand two hundred and eighty-seven shares. His entire interest in the old company was subject to the pledge to appellant, foreclosure of which was then pending. He recognized the lien of appellant upon his entire interest, and the right of appellant to have the lien carried

over to the new stock. The consent of appellant to such an arrangement was necessary. Otherwise it could have proceeded to foreclose against his entire interest in the old company in the form it had been pledged.

Recognizing that appellant was entitled to have all the new stock issued to it as collateral for his debt, by reason of the pledge it held, he requested the consent of appellant that portions of the stock might be issued to other persons on account of other debts he was owing. The appellant at first declined to enter into the reorganization scheme except on the condition that it should retain its lien upon the whole of Brook's interest, and that all the stock to be issued to him in the new company should be subject to a pledge to secure his indebtedness, for the security of which appellant already held a pledge of his entire interest. Appellant, however, did finally consent that a portion of the new shares might be issued to other persons, released from its lien. The evidence, we think, clearly shows that appellant consented to the release of all in excess of twelve thousand shares, and no more. Accordingly, upon Brook's direction, twelve thousand shares were issued to the appellant, and he executed a new note for the same indebtedness and a written pledge of that number of shares.

Respondent claims that, before the new stock was issued to appellant and the pledge thereof made, Brook had assigned to him seventeen hundred and sixty-three of the twelve thousand shares, and that Brook could not, for that reason, pledge those shares to appellant. He also claims that appellant had knowledge of this assignment. Appellant disputes that there was an actual assignment, but asserts that what respondent claims amounted to such was a mere memorandum made during the course of the negotiations concerning reorganization, and related only to what Brook desired appellant to do in the way of releasing a portion of the stock. Be that as it may, however, and conceding that it constituted an assignment, and that appellant had knowledge of it, still

we think the evidence establishes that appellant at no time consented that those shares should be released from its lien. Whatever the transaction between Brook and the respondent may have been, it could have amounted to no more than an assignment of the stock subject to appellant's lien. Respondent must have had knowledge of the existence of that lien, both because of negotiations to secure its release, in some of which he participated, and also because of his representation of Brook as his counsel in the suit theretofore brought by appellant to foreclose against all of Brook's interest in the old company.

We have not undertaken to reconcile apparently conflicting testimony, for the reason that we think, as to material facts, there is not necessarily any conflict. Respondent in good faith claims an assignment, and that appellant knew thereof; but the essential fact in the case is, did appellant release its lien? A careful reading of the statement of facts convinces us that it did not. The lien was therefore continuous. The mere fact that the form of the pledge was changed did not release the impress of the lien upon any portion of the thing pledged, which was Brook's interest in the property to the extent that twelve thousand shares bore to the whole. There was never a time when the shares were relieved of the lien so that Brook could assign them without carrying the lien with them. Even were it true, as the court found, that appellant accepted the pledge in its last form of seventeen hundred and sixty-three of the shares with full knowledge that they had been theretofore transferred to respondent, still it does not follow that such fact defeats the lien. Appellant might have had full knowledge of the assignment, but knowing that it held an unreleased prior pledge of Brook, it knew that such assignment could effect only a transfer of the right of Brook subject to the lien of the pledge.

We therefore think the decree is erroneous in so far as it relates to the seventeen hundred and sixty-three shares, and

that appellant is entitled to foreclosure against the whole of the twelve thousand shares pledged. The cause is therefore remanded, with instructions to modify the decree in said particular.

MOUNT, C. J., FULLERTON, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5938. Decided March 9, 1906.]

A. G. WEANDER, *Appellant*, v. CLAUSSEN BREWING ASSOCIATION, *Respondent*.[1]

LANDLORD AND TENANT—LEASE—ASSIGNMENT—LEGAL EFFECT OF INSTRUMENT. A written instrument under which a tenant of a building turned over to another the demised premises, constitutes an assignment of the lease and not a sub-lease, and does not create the relation of landlord and tenant between the parties, where, although it was in form a lease, it covered the entire term acquired by the grantor under the original lease, without any reversion to the grantor, and contained the exact terms and covenants thereof.

SAME—EVICTION—LIABILITY OF ASSIGNOR. Where an instrument is an assignment of a full leasehold term, the assignor is not liable to the assignee for a wrongful eviction by the original lessor, notwithstanding the right of re-entry for nonpayment of rent was reserved to the assignor.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 23, 1905, upon granting a nonsuit, at the close of plaintiff's case, in an action to recover damages for a wrongful eviction. Affirmed.

John B. Hart, for appellant.

Brown, Leehey & Kane, for respondent.

HADLEY, J.—This is an action to recover damages on account of an alleged eviction from leased premises. The premises consist of a part of the Mitchell hotel building, in the

[1]Reported in 84 Pac. 735.

city of Everett. The owner leased to one Morrill, who, in turn, leased to the Claussen Brewing Association, and the plaintiff claims that the latter leased to him. By reason of some default on the part of the original lessee, the owner terminated his lease and ousted him, and his subtenants were likewise ousted. The plaintiff then brought this suit against the Claussen Brewing Association, claiming damages against it because of the eviction. Defendant answered, admitting its lease from Morrill, the original lessee, but alleged that it assigned to the plaintiff all of its rights in said lease. The cause proceeded to trial before a jury, and at the close of the testimony in behalf of plaintiff, the defendant challenged its sufficiency, and moved that the case be withdrawn from the jury. The challenge and motion were granted, the jury was discharged, and judgment was entered dismissing the action. The plaintiff has appealed.

The real question in the case is, did the relation of landlord and tenant exist between the parties? In order to pass upon this question it is necessary to determine what was the legal effect of the written instrument which they jointly executed. Appellant contends that it was a lease, and that it constituted him a tenant of respondent, while the latter urges that it was in law an assignment and not a lease, for the reason that it transferred all rights which respondent acquired from its lessor, including the entire term under its lease, with no reversionary interest reserved. The instrument is in the form of a lease, and contains apt words designating it as such; but it covers the entire term which respondent had acquired by its own lease. No portion of the term whatever is reserved for reversion to respondent. It is conceded that the terms and covenants of the instrument are in the exact words of the lease held by respondent, and no other or new covenants are included therein. We think, under the authorities, that the legal effect of such an instrument is that of an assignment in full of the lease by its holder; that it is not a new lease, which creates a new lessor and subtenant,

with the relation of landlord and tenant between the two, but the new nominal lessee becomes an assignee of the whole leasehold estate affected.

"A lessee's parting with his interest in the whole of the leasehold estate for the balance of his term, or with his interest in a part of the demised premises for the entire term, constitutes an assignment or assignment *pro tanto* of the lease, and the person to whom such an interest is conveyed becomes an assignee of the term with all the rights and liabilities incident to such a position. It is immaterial by what kind of an instrument or conveyance the term is so disposed of. Thus, the grantee or nominal lessee becomes an assignee if the lessee executes a quitclaim deed of his rights in the leasehold estate, or executes an instrument purporting to be a lease or demise of the premises for the balance of his unexpired term or a period exceeding his term, or conveys the premises in fee simple. To constitute an assignment the lessee must, however, part with his entire interest in the whole or a part of the premises." 18 Am. & Eng. Ency. Law (2d ed.), 656, 657.

Again, the same principle is stated as follows:

"A *term* signifies not only the limitation of time, or period granted to the lessee for the occupation of the premises, but it includes also the estate and interest in the land that pass during such period. The words 'lease' and 'demise' are often used to signify the estate or interest which is conveyed, but they properly apply to the instrument or means of conveyance. And it is essential to a lease that some reversionary interest be left in the lessor; for if by an instrument purporting to be a demise, he parts with his whole interest in the premises, or makes a lease for a period exceeding his own term, it will, in either case, amount to an assignment of the term." 1 Taylor, Landlord & Tenant (9th ed.), § 16.

The principle is fully sustained by the following decided cases: *Sexton v. Chicago Storage Co.*, 129 Ill. 318, 21 N. E. 920, 16 Am. St. 274; *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236; *Smiley v. Van Winkle*, 6 Cal. 605; *Lee v. Payne*, 4 Mich. 106; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Bedford v. Terhune*, 30 N. Y. 453, 86

Am. Dec. 394; *St. Joseph etc. R. Co. v. St. Louis etc. R. Co.*, 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607; *Cook v. Jones*, 96 Ky. 283, 28 S. W. 960; *Mulligan v. Hollingsworth*, 99 Fed. 216; *McLennan v. Grant*, 8 Wash. 603, 36 Pac. 682.

Appellant argues that the instrument is a lease as between himself and respondent, although it may be an assignment as to others. We do not think so, in view of the doctrine maintained by the weight of the decided cases. Respondent parted with its entire interest. It is true, it reserved the right of re-entry at the close of the term; but that provision is without force for the reason that, at the end of the term, there would be nothing left of which it could take possession. It also reserved the right of re-entry in case of default in payment of rent or breach of any of the covenants. The rental terms and covenants being, however, precisely the same as its own in the lease with its lessor, the authorities maintain that the legal effect of the instrument is not changed from that of an assignment to that of a lease, even though the right of re-entry for condition broken be reserved. While there is some conflict upon this point, yet we think the weight of authority decidedly supports the rule as stated. In *Craig v. Summers, supra*, it was said:

"So the right of re-entry is not an estate or interest in land, nor does it imply a reservation of a reversion. It is a mere chose in action. When enforced, the grantor is in through the breach of the condition, and not by the reverter."

The instrument being an assignment of a full leasehold term by respondent to appellant, an action does not lie in favor of the assignee and against the assignor for an act of the original lessor. *Blair v. Rankin*, 11 Mo. 282; *Waldo v. Hall*, 14 Mass. 486; *M'Clenahan v. Gwynn*, 3 Munf. (Ky.) 556; *Knickerbacker v. Killmore*, 9 Johns. 105.

"There is no instance produced, nor can we find any, of an action by an assignee against an assignor *upon a covenant in law* for an eviction in consequence of an act done by the original lessors. . . ." *Waldo v. Hall, supra.*

We think the court did not err in its application of the law, and the judgment is affirmed.

Mount, C. J., Fullerton, Rudkin, Crow, Root, and Dunbar, JJ., concur.

[No. 5752. Decided March 9, 1906.]

Mabel Johnston *et al., Respondents,* v. Northern Lumber Company, *Appellant.*[1]

Master and Servant—Assumption of Risks—Providing Guards Under Factory Act. The factory act of 1903, requiring employers to provide proper guards for cogs, saws and dangerous machinery, does not deprive the master of the defense of assumed risk, where he has made a *bona fide* effort and used due care to provide a guard for an edger, which an experienced employee had used for three years without objection, and where the employee was injured by a most unusual accident that could not have been reasonably anticipated; and in such case the employee assumes the risk of the injury from such fact, and cannot claim that the guard was not a proper guard.

Appeal from a judgment of the superior court for Snohomish county, Joiner, J., entered December 20, 1904, upon the verdict of a jury rendered in favor of the plaintiffs, in an action to recover damages for the death of an employee in a mill, struck by a splinter thrown from an edger. Reversed.

Graves, Palmer, Brown & Murphy and *Cooley & Horan* (*C. H. Winders,* of counsel), for appellant.

Robt. A. Hulbert and *Earl W. Husted,* for respondents.

Crow, J.—This action was instituted by Mabel Johnston, widow, and Allen F. Johnston and Dorothy D. Johnston, children and minor heirs at law, of Fred J. Johnston, deceased, to recover damages for the alleged wrongful death of their husband and father. The respondents alleged that, prior to

[1]Reported in 84 Pac. 627.

and on March 9, 1904, Fred J. Johnston was in the employ of appellant, the Northern Lumber Company, as an edgerman, at its sawmill near Everett, in Snohomish county; that it was his duty to feed or push timbers between certain rollers into an edger, in the center of which were located a number of circular saws designed to cut said timber into boards of proper width and sizes.

Respondents claim: (1) that the edger was not properly constructed, and (2) that it was not provided with proper and necessary guards. The complaint alleges that, while said Fred J. Johnston was feeding said edger, by reason of its imperfections and defective condition, and by reason of the negligence and failure of appellant to provide proper safeguards, a large splinter, thrown from the saws over the front rollers, struck him over the heart, inflicting injuries causing his death. It being shown at the trial that the machine was of a standard make and in good repair, respondents' entire claim to negligence on the part of appellant hinged upon the question whether the edger was provided with the proper and necessary safeguards required by the factory act of 1903.

Appellant, answering the complaint, denied that Fred J. Johnston's death was the result of any negligence upon its part, denied that the edger was defective, or that it was not properly guarded, and affirmatively pleaded contributory negligence and assumption of risk. At the close of respondents' case, appellant made a motion for a nonsuit, which motion was denied. At the close of all the evidence, appellant made a motion for a directed verdict in its favor, which motion was also denied. The jury having returned a verdict in favor of respondents, and appellant's separate motions for a new trial and for judgment *non obstante veredicto* having been denied, judgment was entered upon the verdict, and this appeal has been taken.

It appears from undisputed evidence that Fred J. Johnston had been in charge of this particular edger, and had operated it as an employee of appellant, for a period of

more than three years immediately preceding his death; that at the time of the accident he was pushing two pieces of lumber, each two by twelve inches in size, between the front rollers, to be cut by the saws into two-by-sixes. One of these pieces of lumber was placed immediately on top of the other, making a total thickness of four inches, thus requiring the front rollers to be that distance apart. There were two pairs of rollers, one pair in front, and the other in the rear of the saws, the two sets being about twenty to twenty-four inches apart. There were several saws in the edger, each about twenty inches in diameter, and extending about seven and one-half to eight inches above the arbor. The rollers were operated and adjusted by levers located at the front end of the machine where the edgerman stood. Each roller was about forty inches in length and six inches in diameter.

When the rollers were receiving lumber, the space between them not occupied by the lumber was open and unprotected. Respondents do not claim this space should have been guarded. In fact, it is conceded it could not be guarded, and no claim of negligence is based upon the absence of any guard there. Appellant had provided two guards to protect the edgerman from flying sawdust and splinters, one in a horizontal position immediately over the saws and about nine inches above the surface of the edger, and no claim is made that it was not a proper and sufficient guard. As the rollers, however, could be adjusted from a close contact with each other to a distance of about seven inches apart, there was an open space of variable width in front of the saws above the front rollers, and below the stationary or horizontal guard, requiring some proper guard to prevent dust and splinters from coming over the rollers and striking the edgerman. To provide such protection, appellant had adjusted a wooden curtain or guard, about one and one-half inches thick, twenty inches wide, and forty inches long, which was suspended by hinges from an iron bar above the rollers, hanging in a slanting position in front of the open space above the rollers, resting upon the

rollers, and so adjusted as to be swung upon the hinges. This curtain weighed from thirty to fifty pounds. During all the years the deceased had operated this edger, it had been provided with a guard of this character. He never complained of it, nor did he ever claim the edger was not a suitable machine or not in good repair.

Respondents contend the curtain was not a proper or sufficient guard; that it did not comply with the requirements of the factory act of 1903; that appellant was negligent in not providing a better and safer guard, and that the splinter which caused Mr. Johnston's death struck said guard, caused the same to rise by swinging on its hinges, and came out of the edger above the rollers, which with a proper guard could not have occurred; while appellant contends that the splinter came through the open space between the rollers. No witness, either on behalf of appellant or respondents, testified to an utter absence of any guard, or gave any evidence tending to show an absolute failure on the part of appellant to provide any guard whatever. Some two or three witnesses on behalf of respondents gave testimony tending to show that, in their opinion, the curtain was not the best or safest guard that could have been provided; but they are quite indefinite and indistinct in explaining what would have been a proper guard. On the other hand, a number of experienced mill men, as witnesses for appellant, testified that the curtain was not only a proper and suitable safeguard, but that it was the best protection that could be designed.

Many assignments of error are discussed in the briefs, yet the two controlling questions here are: (1) Does a failure or refusal to comply with the factory act of 1903 deprive appellant of the common law defense of assumption of risk? (2) if so, does the factory act render the master an insurer of his servant, or has he complied with the statute when he has furnished guards which are a sufficient protection against all dangers which an ordinarily prudent person could anticipate? The first of these questions has been answered in the affirma-

tive by the cases of *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915; *Whelan v. Washington Lum. Co.*, 41 Wash. 153, 83 Pac. 98; *Hoveland v. Hall Bros. Marine R. etc. Co.*, 41 Wash. 164, 82 Pac. 1090; and *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3.

The evidence shows that appellant had made an honest, careful, and *bona fide* effort to safeguard the edger, and that in doing so it had exercised due caution and its very best judgment. It is conceded that this accident was a most unusual and unexpected one, such as none of the witnesses save one had ever seen or heard of, and that one witness testified that the accident within his knowledge had occurred in an eastern state on a different make of machine, provided with a different guard and under circumstance. not similar to those of this case. The decedent had worked at the machine with the same guard in apparent safety for more than three years. He took care of his own machine, and knew as much about the safeguards as did appellant. In the *Hall* case, and other recent cases above cited, there was no attempt to maintain a proper guard, or any guard at all. Here the facts are different, as a guard approved by experienced mill men was maintained. In *Daffron v. Majestic Laundry Co.*, 41 Wash. 65, 82 Pac. 1089, this court said:

"Respondent contends that it was not a 'proper' guard, for the reason that it did not prevent the injury while some other kind of a guard would have done so. It was not shown that any particular kind of guard was recognized or accepted generally as being essential to meet the requirements of the statute. But it was shown by respondent's witnesses that there are several different kinds of guards in use. No particular kind is required by the statute or any recognized custom or authority. This being true, what would be the duty of a laundry owner in the premises? How could he tell what would be regarded as a 'proper' guard, within the meaning of this statute? He has no standard to go by. He could only rely upon his own experience, observation, and judgment. Before appellant can be deprived of the defense of assumed risk, it must affirmatively appear that it violated this fac-

tory act in not having a proper guard. It is only required to provide guards sufficient to protect against such dangers as reasonably intelligent and experienced laundrymen would anticipate."

So here, appellant was only required to provide guards sufficient to protect against such dangers as reasonably intelligent and experienced mill men would anticipate. Witnesses for both appellant and respondents concede this accident to have been most unusual, and one that could not have been reasonably expected or anticipated. In *Daffron v. Majestic Laundry Co., supra,* this court further said:

"The law is well settled that, where an employer places a guard sufficient to protect against all dangers reasonably to be anticipated, he is not guilty of negligence because the guard fails to protect against an unforseen danger against which it was not intended as a protection. *Decker v. Stimson Mill Co.,* 31 Wash. 522, 72 Pac. 98."

The evidence shows that the decedent, an experienced man, had worked at the edger for more than three years, and it is not contended by respondents that the defense of assumption of risk could be denied to appellant except for the factory act of 1903, a penal statute. Assume that appellant's manager or president had been arrested in a criminal action, and charged with a violation of this statute, would it be contended for one moment under the facts here shown, that any jury would find him guilty, or that any court would permit a verdict of guilty to stand, he having made a *bona fide,* judicious, and careful effort to comply with the statute? If so, he would be convicted simply because, after the guard had proven sufficient for many years, an unexpected and unusual accident, not anticipated by practical and experienced mill men, had occurred. Such a judgment of conviction could not be permitted to stand. Yet it will be conceded that appellant can be deprived of the defense of assumption of risk, if at all, only because of the existence of this penal statute. Although the doctrine announced in the *Hall* case is the law

of this state, it would be going too far to so extend it as to cut off the defense of assumption of risk when there has been an intelligent, careful, judicious, and honest effort on the part of the master to comply with the requirements of the factory act. Where such an effort has been prudently made by the master, and an experienced, skillful servant has ample opportunity for seeing, knowing and learning whether a guard is proper, and with such opportunities continues his work, he should be held to have assumed the risk of his employment, including the sufficiency of such guard. To hold otherwise would be to announce not only the doctrine that the master must provide the servant with a reasonably safe place to work, but also that he must under all circumstances be an insurer of the life and safety of his servant. Appellant, having in good faith endeavored to comply with the requirements of the factory act in a careful and judicious manner, is entitled to interpose the defense of assumption of risk.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

Mount, C. J., Rudkin, Fullerton, Hadley, and Dunbar, JJ., concur.

Root, J., having been of counsel, took no part.

[No. 5967. Decided March 9, 1906.]

THE STATE OF WASHINGTON, *on the Relation of A. J. Richey, Plaintiff,* v. L. C. SMITH, *Sheriff of King County, Respondent.*[1]

CONSTITUTIONAL LAW — CIVIL RIGHTS — LICENSING OF PLUMBERS. Laws 1905, p. 126, regulating the business of plumbing and requiring plumbers to secure a license from an examining board cannot be sustained as a health regulation, and infringes the state and Federal constitutions by depriving them of the pursuit of happiness and liberty to pursue their chosen calling.

Application filed in the supreme court November 21, 1905, for a writ of habeas corpus, to release from custody a plumber, convicted before a justice of the peace of engaging in the business of plumbing without having obtained a license. Denied.

E. H. Flueck, for relator, contended, among other things, that limiting the act to cities of over ten thousand inhabitants, violates Const., art. 1, § 12 and the 14th Amendment of the Federal Constitution, in that it is an arbitrary classification. *State ex rel. Chapel v. Justus,* 90 Minn. 474, 97 N. W. 124; *State ex rel. Douglas v. Ritt,* 76 Minn. 531, 79 N. W. 535; *State v. Cooley,* 56 Minn. 540, 58 N. W. 150; *Nichols v. Walter,* 37 Minn. 264, 33 N. W. 800; *Johnson v. St. Paul etc. R. Co.,* 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Lavallee v. St. Paul etc. R. Co.,* 40 Minn. 249, 41 N. W. 974; *Murray v. Board of Com'rs,* 81 Minn. 359, 84 N. W. 103, 83 Am. St. 379, 51 L. R. A. 828; *McDaniels v. Connelly Shoe Co.,* 30 Wash. 549, 71 Pac. 37; *In re Camp,* 38 Wash. 393, 80 Pac. 547; *In re Jacobs,* 98 N. Y. 98, 50 Am. Rep. 636; *State ex rel. Richards v. Hammer,* 42 N. J. L. 435; *State v. Inhabitants of Trenton,* 54 N. J. L. 444, 24 Atl. 478; *Frorer v. People,* 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; *Lippman v. People,* 175 Ill. 101, 51

[1]Reported in 84 Pac. 851.

N. E. 872; *State v. Loomis,* 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; *State v. Hinman,* 65 N. H. 103, 18 Atl. 194, 23 Am. St. 22; *State v. Pennoyer,* 65 N. H. 113, 18 Atl. 878; *Gulf etc. R. Co. v. Ellis,* 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Connoly v. Union Sewer Pipe Co.,* 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *Magoun v. Illinois etc. Bank,* 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1043; *Billings v. Illinois,* 188 U. S. 97, 23 Sup. Ct. 272, 47 L. Ed. 403; *Kentucky Railroad Tax Cases,* 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; *In re Sam Kee,* 31 Fed. 680; *In re Yot Sang,* 75 Fed. 983; *Stockton Laundry Case,* 26 Fed. 611; *Kane v. Erie R. Co.,* 133 Fed. 681; *In re Grice,* 79 Fed. 627; *Ritchie v. People,* 155 Ill. 98, 40 N. E. 454, 46 Am. St. 315, 29 L. R. A. 79. Section 10, giving the board arbitrary power to determine the applicant's competency, violates, Const. art. 1, § 3, and the Fourteenth Amendment. *Harmon v. State,* 66 Ohio St. 249, 64 N. E. 117; *Baltimore v. Radecke,* 49 Md. 217, 33 Am. Rep. 239; *Ex parte Sing Lee,* 96 Cal. 354, 31 Pac. 245, 31 Am. St. 218; *Los Angeles v. Cemetary Association* (Cal.) 57 Pac. 153; *State v. Mahner,* 43 La. Ann. 496, 9 South. 480; *State v. Julow,* 129 Mo. 163, 31 S. W. 781, 50 Am. St. 443, 29 L. R. A. 257; *Charles v. Marion,* 98 Fed. 166; *Yick Wo v. Hopkins,* 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Chicago etc. R. Co. v. Chicago,* 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *Holden v. Hardy,* 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. Section 10 creates a favored class. *Harmon v. State,* 66 Ohio St. 249, 64 N. E. 117, 58 L. R. A. 618; *State v. Inhabitants of West Hoboken,* 54 N. J. L. 508, 24 Atl. 477; *Noel v. People,* 187 Ill. 587, 58 N. E. 616, 79 Am. St. 238, 52 L. R. A. 287. That the occupation of a plumber is not properly a subject for police regulations, see, also: 1 Tiedeman, State and Federal Control, pp. 236-238; *State v. Brown* 37 Wash. 97, 79 Pac. 635; *In re Aubrey,* 36 Wash. 308, 78 Pac. 900; *People ex rel. Nechamcus v. Warden,* 144 N. Y. 529, 39 N. E. 686, dis-

senting opinion; *People ex rel. Tyroler v. Warden of City Prison,* 157 N. Y. 116, 51 N. E. 1006, 68 Am. St. 763, 43 L. R. A. 264; *People v. Marx,* 99 N. Y. 377, 52 Am. Rep. 34; *Ritchie v. People,* 155 Ill. 98, 40 N. E. 454, 46 Am. St. 315, 29 L. R. A. 79; *Ex parte Whitwell,* 98 Cal. 73, 32 Pac. 870, 35 Am. St. 152, 19 L. R. A. 727; *Iler v. Ross,* 64 Neb. 710, 90 N. W. 869, 97 Am. St. 676, 57 L. R. A. 895; *Young v. Commonwealth,* 101 Va. 853, 45 S. E. 327; *Hong Wah,* 82 Fed. 623; *Allgeyer v. Louisiana,* 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832; *Lawton v. Steele,* 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; *Stockdealers Cases,* Fed. Cas. No. 8,408; *Soon Hing v. Crowley,* 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Lochner v. New York,* 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937; *Minnesota v. Barber,* 136 U. S. 313, 10 Sup. Ct. 862, 34 L. Ed. 455.

Kenneth Mackintosh and *John B. Hart,* for respondent, to the point that the act was a proper exercise of the police power, cited: *Singer v. State* 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551; *State v. Buchanan,* 29 Wash. 602, 70 Pac. 52; *State v. Sharpless,* 31 Wash. 191, 71 Pac. 737; *State v. Carey,* 4 Wash. 424, 30 Pac. 729; *State ex rel. Smith v. Dental Examiners,* 31 Wash. 492, 72 Pac. 110; 22 Am. & Eng. Ency. Law (2d ed.), pp. 931-938; *State ex rel. Chapel v. Justus,* 90 Minn. 474, 97 N. W. 124; *State v. Gardner,* 58 Ohio St. 599, 51 N. E. 136, 65 Am. St. 785; *State ex rel. Winkler v. Benzenberg* 101 Wis. 172, 76 N. W. 345; *People ex rel. Nechamcus v. Warden of City Prison,* 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718; *Schnaier v. Navarre Hotel etc. Co.,* 182 N. Y. 83, 74 N. E. 561. The legislature could limit the operation of the act to cities of ten thousand inhabitants. *State v. Sharpless,* 31 Wash. 191, 71 Pac. 737; *State v. Vance,* 29 Wash. 435, 70 Pac. 34; *Redford v. Spokane Street R. Co.,* 15 Wash. 419, 46 Pac. 650; *Fitch v. Applegate,* 24 Wash. 25, 64 Pac. 147; *McDaniels v. Connelly Shoe Co.* 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947;

Ex parte Camp, 38 Wash. 393, 80 Pac. 547; *Garfinkle v. Sullivan,* 37 Wash. 650, 80 Pac. 188; *Henry v. Thurston County,* 31 Wash. 638, 72 Pac. 488; *Dent v. West Virginia,* 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623; *Barbier v. Connolly,* 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Hayes v. Missouri,* 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578; *Soon Hing v. Crowley,* 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Ex parte Lucas,* 160 Mo. 218, 61 S. W. 218, *State v. Tower,* 185 Mo. 79, 84 S. W. 10; *Murphy v. State,* 114 Tenn. 531, 86 S. W. 711; *Van Cleve v. Passaic Valley Sewerage Com'rs* (N. J.), 58 Atl. 571; *Brown's Case,* 173 Mass. 498, 53 N. E. 998.

RUDKIN, J.—The appellant was convicted before one of the justices of the peace of King county of the crime of engaging in the business of plumbing as a journeyman plumber, in violation of Section 12 of the Act of March 4, 1905, Laws 1905, p. 126, entitled, "An act to regulate plumbing in cities having a population of ten thousand inhabitants or over, providing for the licensing of persons to carry on the business and work of plumbing, creating a board of plumbing examiners, fixing the compensation of plumbing examiners, providing a penalty for the violation hereof and repealing all acts in conflict herewith," without first having obtained a license so to do, as prescribed by the preceding section of said act, and was sentenced to pay a fine of $15, and costs of prosecution. He was committed to the custody of respondent, as sheriff of King county, in execution of this sentence, and applied to this court for a writ of habeas corpus, on the ground that the restraint and imprisonment were illegal: (1) Because said act violates section 1 of article 14 of the Amendments to the Constitution of the United States; (2) because said act violates sections 3 and 12, of article 1 of the Constitution of the state of Washington; and (3) because said act is an unlawful delegation of legislative power.

The case is now before us on the application and return to the show cause order heretofore granted.

The power of the legislature to make all needful rules and regulations for the health, comfort, and well-being of society cannot be questioned, but there are certain limits beyond which the legislature cannot go, without trenching upon liberty and property rights which are safeguarded by the state and Federal constitutions. As said by the court in *In re Jacobs,* 98 N. Y. 98, 50 Am. Rep. 636,

"The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the Constitution. . . . Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded."

And in *In re Aubrey,* 36 Wash. 308, 78 Pac. 900, this court said:

"It may be stated, as a general principle of law, that it is the province of the legislature to determine whether the conditions exist which warrant the exercise of this power; but the question, what are the subjects of its exercise, is clearly a judicial question. One may be deprived of his liberty, and his constitutional rights thereto may be violated, without the actual imprisonment or restraint of his person. 'Liberty' in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work when he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which impair or trammel these rights—which limit him in his choice of a trade or profession—are infringements upon his fundamental rights of liberty, which are under constitutional protection."

Acts of simlar import but relating to different professions, trades, and occupations have often been before this court. Thus, in *State v. Carey,* 4 Wash. 424, 30 Pac. 729, an act regulating the practice of medicine and surgery was sustained. In *State ex rel. Smith v. Board of Dental Examiners,* 31 Wash. 492, 72 Pac. 110, and in *In re Thompson,* 36 Wash. 377, 78 Pac. 899, a similar act regulating the practice of dentistry was upheld. In *State v. Sharpless,* 31 Wash. 191, 71 Pac. 737, involving the validity of the act regulating the business of barbering, a similar ruling was made. But, in *In re Aubrey, supra,* an act regulating the business of horseshoeing was declared unconstitutional, and without the police power of the state. Some of the acts considered in the above cases were manifestly needful and proper for the protection of the public health, others were on the border line.

Acts similar to the one now before us have been before the courts of last resort in a number of states. In *Singer v. State,* 72 Md. 464, 19 Atl. 1044, 8 L. R. A. 551, the court of appeals of Maryland, held that an act regulating the business of plumbing was a valid police regulation. In *State v. Gardner,* 58 Ohio St. 599, 51 N. E. 136, 65 Am. St. 785, 41 L. R. A. 689, the supreme court of Ohio held that the business of plumbing was a proper subject for police regulation, but the Ohio act was declared unconstitutional because it discriminated between individuals, and firms and corporations. In *State ex rel. Winkler v. Benzenberg,* 101 Wis. 172, 76 N. W. 345, the supreme court of Wisconsin made a similar ruling. In *State ex rel. Chapel v. Justus,* 90 Minn. 474, 97 N. W. 124, the supreme court of Minnesota, held that the business of plumbing was a proper subject for police regulation, but the Minnesota act was declared unconstitutional because its classification was arbitrary and unreasonable. In *People ex rel. Nechamcus v. Warden of City Prison,* 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718, a bare majority of the court of appeals upheld the validity of the plumbing act of that state. The only difference between the New York

act and our own lies in the fact that the former applied to employing or master plumbers only, while the latter includes journeymen plumbers as well. No importance was attached to this omission or difference, however, in either the majority or dissenting opinion. Indeed the objection could only go to the efficacy of the law, and not to its validity; for if the subject can be regulated in its entirety, it can be regulated in part. The majority opinion concedes "that the act skirts pretty closely that border line beyond which legislation ceases to be within the powers conferred by the people of the state, through the constitution, upon its legislative body." In his dissenting opinion, concurred in by two of the other justices, Mr. Justice Peckham said:

"It is said this is proper and right in order that the public may have some assurance that the master or employing plumber is not alone capable of following his trade as such, but that he has sufficient knowledge of the laws of health as applicable to plumbing to enable him scientifically to follow that trade as a master plumber. It is to be observed that the examination does not necessarily call for any such knowledge. The act can be complied with, so far as this examination is concerned, if the applicant has but the most ordinary knowledge of the laws of his trade and the proper way to follow it practically. It is true the board may demand much more than that, and much more than was ever necessary to practically pursue the trade. If such additional knowledge were exacted it would be in fact adding to the known and ordinary qualifications necessary to carry on the well-recognized trade of a plumber, those other and entirely different and much superior qualifications necessary in one who intended to conduct the professional business of a sanitary expert with regard to systems and general plans of plumbing. The legislature has no power to impose such a condition upon one desiring to exercise such a trade. It has, as I believe, no power to prescribe that an individual who desires to follow the trade of a plumber shall be possessed of qualifications which do not naturally pertain to such a calling, and which are only possessed by persons qualified for the pursuit of a very different occupation, involving learning and skill of an uncommon order. The legislature might probably provide for a sani-

tary inspection of plumbing work and thus secure a kind of work, as to its system and sufficiency, which might fairly be said to tend towards the protection of the health of the general public. But the trade of the practical plumber is not one of the learned professions, nor does such a tradesman hold himself out in any manner as an expert in the science of 'sanitation,' nor is any such knowledge expected of him, and this act, when practically enforced, may or may not exact it of him. This board has the very greatest and an entirely arbitrary discretion as to what qualifications it will exact from the applicant. It may make an examination which none but an expert in sanitary knowledge could pass, or it may make the examination entirely perfunctory. Judging from the other features of the act, it will depend upon considerations which are foreign to any question of health as to what kind of examination will be made.

"If the broader and more severe examination is held, or the greater qualification is insisted on, the imposition of such a condition in the case of a workman upon his natural right to work at his ordinary trade renders the act under which such a condition can be imposed unconstitutional. Whether in all cases the condition would be insisted on is immaterial. It is the power to insist upon it under the law which makes the law itself void.

"And yet, if the more severe examination is not made, and the superior qualification exacted, the act is absolutely worthless as a health measure. If it is intended as an act simply to secure the ordinary capacity necessary for the prosecution of the trade of a plumber, it is useless and vexatious, and not a health regulation in any form. If it exact more, it is an improper addition to the qualifications of a simple tradesman. This act permits the greater exaction to be made.

"It seems to me very absurd to treat this statute as one which in any possible manner affects, or which was really intended to affect, the public health. And when it is seen that the work of the master plumber may be performed by journeymen who have been subjected to no official examination, and whose work need not be examined by any one, not even by the master plumber himself, the radical failure of the act to really protect the public health is quite apparent. Sewer gas is dangerous, but exactly how to treat the matter of plumbing in order to run the least danger therefrom, is a

subject for professional learning and skill, except as to the narrow part of the tradesman-plumber, which is to see to it that his pipes do not leak, and that they do not permit the escape of gas. This part is mechanical and easily understood, and is the part which the tradesman performs, and the system, the proper arrangement thereof, and such kindred questions, are for the determination of a more scientific and a more learned body of men.

"The examination provided for by this act, if conducted for the sole purpose of discovering the qualifications of an applicant in regard to those matters which pertain and are germane to the real and practical trade of a plumber, will not have the slightest tendency to discover whether he has also the requisite knowledge to enable him to act as a sanitary expert.

"Taking the act as a whole, it would seem quite apparent that its purpose is to enable the employing plumbers to create a sort of guild or body among themselves, into which none is to be permitted to enter excepting as he may pass an examination, the requisites of which are not stated, and where his success or failure is to be determined by a board of which some of their own number are members. In order to be at liberty to exercise his trade as a master plumber he must pass this examination and become a member of this favored body. It is difficult for me to see the least resemblance to a health regulation in all this.

"I think the act is vicious in its purpose and that it tends directly to the creation and fostering of a monopoly.

"It seems to me most unfortunate that this court should, by a strained construction of the act as a health law, give its sanction to this kind of pernicious legislation. We shut our eyes to the evident purpose of the statute, and by means of maxims well enough in their way, but sadly out of place here, impute a purpose to the legislature which it plainly did not have, and which, if it did have, it has failed to carry out, even conceding that the purpose could be legitimately effected by other means. This measure detracts from the liberty of the citizen acting as a tradesman in his efforts to support himself and his family by the honest practice of a useful trade, and I think no court ought to sanction such legislation unless it tends much more plainly than does this act towards the preservation of the health and comfort of the public."

We have quoted at length from this dissent because a Federal question is involved, and because the views of the learned justice are in accord with our own, and in our opinion are shared by a majority of the supreme court of the United States of which he is now a member. In *People v. Lochner*, 177 N. Y. 145, 69 N. E. 373, an act forbidding the employment of bakers in biscuit, bread or cake bakeries, or in confectionery establishments for more than sixty hours in any one week, came before the court for consideration. A bare majority of the court again sustained the act, the two justices, who concurred in the above dissent of Mr. Justice Peckham, dissenting. The case came before the supreme court of the United States on writ of error, and the act was declared unconstitutional and the judgment reversed, Mr. Justice Peckham delivering the opinion of the court. In the course of his opinion the learned Justice said:

"There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family."

Again,

"It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it

is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. . . . The court looks beyond the mere letter of the law in such cases." *Lochner v. New York,* 198 U. S. 45, 25 Sup. Ct. 531, 49 L. Ed. 937.

In his concurring opinion in *Butchers' Union etc. Co. v. Crescent City Live-Stock etc. Co.,* 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585, Mr. Justice Bradley said:

"The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and *the pursuit of happiness.*' This right is a large ingredient in the civil liberty of the citizen."

Again,

"I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."

And again,

"But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it—it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen."

It is true these remarks were made in regard to questions of monopoly—questions not entirely foreign to this case—but they well describe the rights which are covered by the word "liberty" as contained in the Fourteenth Amendment.

We cannot close our eyes to the fact that legislation of this kind is on the increase. Like begets like, and every legislative session brings forth some new act in the interest of some new trade or occupation. The doctor, the lawyer, the druggist, the dentist, the barber, the horseshoer, and the plumber have already received favorable consideration at the hands of our legislature, and the end is not yet, for the nurse and the undertaker are knocking at the door. It will not do to say that any occupation which may remotely affect the public health is subject to this kind of regulation and control. Our health, our comfort, and our well-being are materially affected by all of our surroundings—by the houses we live in, the clothes we wear, and the food we eat. The safety of the traveling public depends in no small degree on the skill and capacity of the section crews that build and repair our railroads; yet are we on this account to add the architect, the carpenter, the tailor, the shoemaker, those who produce and prepare our food, and all the rest, to the ever growing list? If so, it will be but a short time before a man cannot engage in honest toil to earn his daily bread, without first purchasing a license or permit from some board or commission. The public health is entitled to consideration at the hands of the legislative department of the government, but it must be remembered that liberty does not occupy a secondary place in our fundamental law. Under some of the acts to which we have referred members of the board of health form part of the examining board, but our act has not even this saving grace. By its terms two master plumbers and one journeyman plumber are constituted the guardians of the public health and welfare. We are not permitted to inquire into the motive of the legislature, and yet, why should a court blindly declare that the public health is involved, when all the rest of mankind know full well that the control of the plumbing business by the board and its licensees is the sole end in view. We are satisfied that the act has no such relation to the public health as will sustain it as a police or sani-

tary measure, and that its interference with the liberty of the citizen brings it in direct conflict with the constitution of the United States.

The prisoner is entitled to his discharge, and it is so ordered.

Mount, C. J., Dunbar, Fullerton, Hadley, and Crow, JJ., concur.

Root, J. (concurring)—To the foregoing may be added this thought: The liberty and natural rights of a citizen—such as his privilege to engage in a lawful vocation for a livelihood—can be denied him by the legislature only where such deprivation is *necessary* to accomplish a given result essential to the welfare of the public. If that result can be attained in a practicable manner without interference with such liberty and rights, there is an absence of that necessity which is an essential and prerequisite to the validity of such a statute.

In the case at bar, the only justification urged in behalf of the statute is that good plumbing is necessary to the health of people in cities having over ten thousand inhabitants. Avowedly, it is sought to insure good plumbing by means of this statute. It is self-evident that the same or a better result can be obtained by means of statutes or ordinances requiring good plumbing, and insuring it by means of adequate inspection. Such a statute or ordinance would not interfere with the liberty or natural rights of any person, and would safeguard the health of the public as fully as, or more so than, the statute now in question. It therefore follows that the liberty and natural rights of the individual are infringed by this statute unnecessarily and, consequently, unconstitutionally.

[No. 5998. Decided March 10, 1906.]

LOLA M. HILL, *Respondent*, v. W. J. HILL, *Appellant*.[1]

CONTINUANCE—TO SECURE DEPOSITIONS—DIVORCE. In an action for a divorce, brought by a wife against her husband while in the Philippines, it is error, where the defendant appears to have a defense, to refuse him a continuance for a sufficient length of time to enable him to obtain a deposition and have it returned here in time for the trial.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered August 18, 1905, upon findings in favor of the plaintiff, granting a divorce, after a trial before the court without a jury. Reversed.

W. W. Sparks and *E. M. Green*, for appellant.

ROOT, J.—Respondent began this action in Clarke county while her husband was in the service of the government at Manila, where he had gone about a year theretofore. Copies of the complaint and summons were mailed to appellant on the 11th day of January, 1905, the complaint having been filed the day before. These copies were received by appellant at Manila on the 22d day of February. On the 23d day of February he wrote to his father at Vancouver to procure an attorney and defend the case. This letter was received at Vancouver March 31. The court set the case for hearing on the 11th day of May. This hearing was subsequently continued until the 17th of May. On the 15th of May appellant's attorney filed a motion and affidavit for a continuance, alleging the absence of material witnesses, and that he had not time to prepare for the trial. The case was heard on the 17th day of May, but was subsequently reopened on the 3d day of July to permit appellant to take the deposition of certain witnesses in the United States; but the court refused to hold the case open for the deposition of the defendant and one Mobley, who were in Manila, "owing to their distance

[1]Reported in 84 Pac. 829.

from Vancouver, and the time it would take to get a return of such deposition."

It appears that it required from eighty to ninety days for a letter to go from Vancouver to Manila, and for an answer to return. The evidence of respondent showed that, when her husband went to Manila, it was with the understanding that she and their child were to come to him a few months later. A large number of her letters to him were introduced in evidence. They are couched in the most affectionate language, containing many recitals of preparation which she was making to join him in the Philippines. These letters extend over a period of nearly a year. Respondent testified that they were written merely to deceive him, as she had no intention of ever going to or living again with him. We think that, under the peculiar circumstances existing in this case, the trial court should have afforded plenty of time for securing the evidence of appellant and such of his witnesses as could have furnished material evidence. The long distance to Manila rendered it exceedingly inconvenient for the appellant to confer with his counsel, and made the progress of preparing the case necessarily slow. When the court made the order on July 3d permitting appellant to take further depositions of witnesses in the United States, we think it should also, in the light of the facts revealed by the evidence already taken, have permitted a continuance for a sufficient length of time to have obtained appellant's deposition and that of his witness in Manila.

The judgment of the honorable superior court is reversed, and the cause remanded with instructions to afford the appellant ample time to come to Vancouver for trial or to have his deposition taken and returned to be used on the trial, and to procure the deposition of any witness or witnesses living in Manila or elsewhere; and each party shall have the privilege of introducing further evidence at the time of the hearing.

Mount, C. J., Dunbar, Crow, Hadley, and Fullerton, JJ., concur.

[No. 5917. Decided March 10, 1906.]

D. P. McCLURE *et al., Respondents,* v. J. A. CAMPBELL *et al., Appellants.*[1]

LANDLORD AND TENANT—WRONGFUL EVICTION—JOINDER OF CAUSES OF ACTION. In an action for wrongful eviction, it is proper to join causes of actions for property destroyed and for other property converted to the use of the defendant, where the same arise out of the same wrongful act.

SAME—DAMAGES—MENTAL SUFFERING. In an action for wrongful eviction, damages for mental suffering may be recovered as the natural and probable consequences of the wrong, where it appears that one of the plaintiffs was in a delicate condition, that the doors and the walls of their rooms were torn down, their goods removed into the street, and they had no place to go and were humiliated and suffered mental anguish (FULLERTON, J., dissenting).

DAMAGES — EXCESSIVE VERDICT FOR WRONGFUL EVICTION — MENTAL ANGUISH. A verdict in the sum of $2,000 for loss and damage to goods and mental anguish from a wrongful eviction is excessive, and should be reduced to $1,000, where the trial court found that the same was excessive, and where the damage to the goods did not exceed $740, and it appears that most of the distress of the plaintiffs arose from the loss to the property, which remained in the street, guarded by them, for one night, and they suffered slight inconvenience for only a few days.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 19, 1905, upon the verdict of a jury rendered in favor of the plaintiffs in the sum of $2,000 in an action to recover damages for a wrongful eviction. Affirmed upon condition of remitting $1,000.

Hastings & Stedman, for appellants.

Richard Gowan, for respondents.

MOUNT, C. J.—Action for damages for wrongful eviction. Plaintiffs recovered a judgment below. Defendants appeal. The complaint alleges, in substance, that on October 3, 1900, plaintiffs were in the quiet and peaceable possession of

[1]Reported in 84 Pac. 825.

the second and third floors of a certain building in Seattle, and were using said floors for lodging house purposes; that on said day the defendants, wrongfully and unlawfully and by force, entered said building and expelled plaintiffs therefrom, and commenced to, and did, tear down the partitions and walls of the rooms occupied by plaintiffs, and damaged plaintiffs' furniture and destroyed plaintiffs' business, and greatly humiliated the plaintiffs, who were made to suffer great mental anguish. Damages were alleged at $500 for injury to furniture, $1,200 for loss of business, and $3,000 for mental anguish. A second cause of action was stated, to the effect that plaintiffs owned certain electric and water fixtures placed in said building temporarily, and that defendants, at the time stated in the first cause of action, unlawfully entered and destroyed the rooms occupied by plaintiffs, and converted said fixtures to their own use, to plaintiffs' damage in the sum of $200. The defendants demurred to the complaint on the ground that two causes of action were improperly united. This demurrer being overruled, defendants answered, denying generally the allegations of the complaint, and alleged two affirmative defenses: (1) That prior to September, 1900, the premises were occupied by one Madge Snodgrass, by a tenancy from month to month, and that said Madge Snodgrass was given notice terminating her tenancy at the expiration of the month of October, 1900; that in the month of September said Madge Snodgrass sold to plaintiffs all her furniture and fixtures and delivered possession of the premises to plaintiffs, and that thereafter plaintiffs brought an action and recovered damages against said Madge Snodgrass for the injury complained of in this action; (2) that the action was not commenced within the time required by law; and the third defense was to the effect that plaintiffs voluntarily vacated and surrendered the premises in consideration of the release of rent due. Plaintiffs, by a reply, denied the new matter contained in the answer. Upon these

issues the case was tried to the court and a jury, which returned a verdict for the plaintiffs in the sum of $2,000.

Appellants first assign error of the trial court in overruling their demurrer to the complaint, because they claim a cause of action for injury to property cannot be joined with one for conversion of property. The statute provides that the plaintiff may unite several causes of action when they arise out of injury with or without force to the property. Bal. Code, § 4942. The complaint in this case alleges that, by the same act, the defendants injured certain property and destroyed and converted to their own use certain other property. Under the facts stated in the complaint, it was not necessary to state the damages in separate causes of action; but, having done so, the complaint was not demurrable on this ground, because the injuries arose out of the same cause, viz., injury to property by force. The fact that some of the property was only injured, while other was taken or destroyed by the same wrongful act, did not create separate causes of action which could not be joined. *McCorkle v. Mallory,* 30 Wash. 632, 71 Pac. 186.

After plaintiffs had testified that they were peaceably in possession of the rooms, that the defendants with a number of men came and tore out the stairway, removed the toilets, shut off the water, and over the protest and objection of plaintiffs, broke down the doors to the rooms, knocked holes in the plastering, and tore down the walls, scattering plastering and dirt and dust all over plaintiffs' furniture, and removed a part of the furniture into the street so that plaintiffs and their families could not longer remain in the said rooms—the court permitted one of the plaintiffs to testify that his wife, who was living in the rooms, was about five months along in a family way, and that, by reason thereof and because plaintiffs had no place to go, they were humiliated and suffered much mental anguish. The wife was also permitted to testify to the same facts. The court instructed the

jury that they could only consider this evidence for the purpose of showing the effect upon the minds of the plaintiffs, and not for the purpose of showing injury to the wife. Appellants contend that the reception of this evidence was error.

"As a general rule, there may be no recovery for injuries to the feelings in cases of torts to property. . . . The reason of this is believed to be because mental distress is not, in general, a natural and probable consequence of torts to property. So where the manner of commission of a tort to property is such as naturally to cause mental suffering, there can, it seems, be a recovery in damages therefor. 8 Am. & Eng. Ency. Law (2d ed.), 671.

See, also, 2 Greenleaf, Evidence (14th ed.), p. 287; *Fort Worth etc. R. Co. v. Smith* (Tex. Civ. App.), 25 S. W. 1032; *Moyer v. Gordon,* 113 Ind. 282, 14 N. E. 476; *Fillebrown v. Hoar,* 124 Mass. 580. We think the rule above stated and followed in the cases cited is correct, and that, under the circumstances testified to in this case, it was not error to receive the evidence.

Appellants allege error of the court in giving several instructions. The objections to the instructions are wholly without merit, and we are convinced are not seriously made by the appellants, and we shall therefore not discuss them. We have examined the instructions given by the court and find that they were fair, and clearly and correctly gave the law to the jury.

The principal contention of appellants in the case is that the verdict of the jury is excessive. There is merit in this contention. When a motion for a new trial was made, upon the ground that the verdict was excessive, and other grounds, the trial court, in ruling upon the motion, stated that in his opinion the verdict was exeessive, but imposed upon defendants, as a condition for a reduction of the amount of the verdict, that they should accept the amount fixed by the court and abide by it and not appeal therefrom. The reason given for such course by the court was that, if the trial court should

make a mistake in reducing the verdict, the supreme court could not raise it; but if the trial court should make a mistake in not reducing the verdict, the supreme court had the power to reduce it, and for that reason refused to reduce the verdict or to grant a new trial, but entered judgment on the verdict for $2,000, the full amount of it.

Aside from the fact that the trial court concluded that the verdict was excessive, it is clearly so under the evidence offered by the plaintiffs. The damage to the furniture was alleged at $500; there was evidence that the furniture was damaged in that amount. The loss of profits to the business could not have been more than $200, under the instructions of the court, and we doubt if any amount was proved upon this item. The cost of the items of light and water fixtures when put in was stated to have been thirty or forty dollars. The damage for these items could not have been greater than that amount. The balance of the verdict must, therefore, have been for humiliation and mental anguish. Upon this question the evidence shows that a part of the plaintiffs' furniture remained upon the sidewalk for one night, where plaintiffs guarded it; that the plaintiffs and their families were immediately taken into an adjoining rooming house, and suffered slight inconvenience for only a few days. The evidence shows that the mental anguish from which plaintiffs suffered arose from the fact that they had purchased the furniture and good will of the lodging house on September 19, 1900, for $1,700, and on October 3, 1900, the building was taken from them, and they thereupon concluded that the $1,700 paid for the furniture was a total loss to them. They were most distressed on this account. But they probably suffered some distress of mind by reason of the manner in which defendants took possession of the building and put them out. But giving the plaintiffs the full amount for which they could possibly have recovered for the items of property taken and damaged, the amount would be $740. One thou-

sand dollars is a most liberal amount for damages to the plaintiffs, including distress of mind. A judgment for $2,000 is out of all reason. The trial court should have reduced the verdict or granted a new trial.

The cause is remanded, with direction to the lower court to grant a new trial, unless respondents remit $1,000 from the verdict within thirty days after the remittitur from this court is filed below; appellants to recover costs of this appeal.

ROOT, DUNBAR, HADLEY, and CROW, JJ., concur.

FULLERTON, J., (dissenting)—I am of the opinion that this does not belong to that class of cases where recovery should be allowed for mental anguish. I therefore think the judgment should be reversed and a new trial granted.

[No. 5985. Decided March 10, 1906.]

E. L. LINDLEY, *Respondent,* v. K. A. JOHNSTON, *Appellant.*[1]

BOUNDARIES—ADJOINING LANDOWNERS—LOCATION OF DIVISION LINE BY MISTAKE—ADVERSE POSSESSION—LIMITATION OF ACTIONS. Where adjoining landowners, without actual survey, locate a division line and jointly build a fence thereon believing it to be the true line, and occupy, cultivate and exercise exclusive dominion over the land up to such place, acquiescing in such location for overy twenty years, it must be taken as the true boundary; and an action to recover to the true line on discovery of a mistake in the location is barred by the statute of limitations.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered August 5, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

R. F. & R. M. Sturdevant, for appellant.

Miller & Fouts, for respondent.

[1]Reported in 84 Pac. 822.

ROOT, J.—Appellant and respondent are the owners each of a quarter of a certain section of land in Columbia county. Appellant is a successor in interest to Joseph Crawford, who received a patent for the northwest quarter of said section, June 1, 1880; and respondent is the successor in interest of Levi Lindley, who made final proof on the southwest quarter of said section, February 18, 1885, and received patent therefor under the date of April 12, 1887. In 1881, without a surveyor, said Levi Lindley and Joseph Crawford and one S. T. Hanan, who was the owner of the northeast quarter of the same section, established a line between the north and south halves of said section, and upon this line said Lindley and Crawford erected a division fence, which for twenty-four years thereafter served as the boundary line between their farms. Each of these original owners and his successors in interest occupied, cultivated, and exercised exclusive dominion over the land on his side of said fence and up to the same, continuously from 1881 until shortly before the commencement of this suit, in 1905. Shortly before the last mentioned date, an actual survey was made, and it was found that the correct line according to the government survey showed the fence to be so incorrectly located as to leave a portion of the northwest quarter to the south of said fence, and in the inclosure occupied by respondent. Thereupon appellant moved his fence over so as to include said parcel of land, and respondent instituted this action to recover possession thereof. Judgment in the lower court was given in favor of respondent, and from this an appeal is taken.

It is urged by appellant that the location of this line by the original owners of these two tracts of land was not for the purpose of definitely locating and agreeing upon a division line, but merely to establish approximately where the line was, so that they might inclose their land by a fence. Respondent, however, urges that the circumstances were such that the statute of limitations commenced to run at that time,

and that he now has title to the strip of land in dispute by reason of adverse possession. The facts in this case are very similar to those of *Bowers v. Ledgerwood,* 25 Wash. 14, 64 Pac. 936, and we think this case is controlled by the principles enunciated in that. In said case the court, among other things, said:

"It will be observed there is no controversy as to the continued, uninterrupted occupancy by the defendant of the tract in controversy for a period of more than ten years; and the facts certainly establish that the claim and dominion of defendant over the tract was exclusive and inconsistent with any other theory than the claim of ownership, and entitled the defendant to recover in this action, unless we admit the contention urged by counsel for respondent—that the unintentional inclosure or use of a strip of land owned by another and lying next to the boundary, the location of which is not clearly known, will not constitute adverse possession."

The court then decided that such contention could not be upheld. Several times this court has quoted with approval from the case of *Caufield v. Clark,* 17 Ore. 473, 21 Pac. 443, 11 Am. St. 845, the following:

"If one by mistake inclose the land of another, and claim it as his own, his actual possession will work a disseizure, but if ignorant of the boundary line, he makes a mistake in laying his fence, *making no claim, however,* to the lands up to the fence, but only to the true line as it may be subsequently ascertained, and it turns out that he has inclosed the lands of the adjoining proprietor, his possession of the land is not adverse."

See, also, *Wilcox v. Smith,* 38 Wash. 585, 80 Pac. 803; *Suksdorf v. Humphrey,* 36 Wash. 1, 77 Pac. 1071.

It is conceded by all the authorities that, where adjoining landowners locate a division line and agree that it shall be deemed the boundary line, this will bind them, notwithstanding the same may not as a matter of fact be the correct line—assuming, of course, that said agreement is fair, conscionable, and free from fraud. In this case the trial court

found that the original owners of these two tracts of land, in establishing the line as aforesaid, agreed that it should be their boundary line. Appellant maintains that the evidence does not justify the finding of an agreement of this kind. The following extracts from a stipulation of the parties will show what took place, to wit:

"4th. That the aforesaid Joseph Crawford, Levi Lindley, and S. T. Hanan, desired to fence their aforesaid lands, and finding the government corner or half-mile stake at the northwest corner of the aforesaid southwest quarter, being also the southwest corner of the northwest quarter of said section twenty-two, and finding also the government half-mile stake or corner at the southeast corner of the northeast quarter, being also the northeast corner of the southeast quarter of said section twenty-two, they put up a pole at the point where the said half-mile stakes were found at said corners, and also put up a pole at what they deemed was near the center of said section twenty-two, and moved said pole and measured until they located what they deemed was the center of said section twenty-two, and established what in their judgment and from their measurements was the line running east and west through the center of said section twenty-two and believing said line so established to be the true boundary line between the north half of said section twenty-two, and the south half thereof; and Levi Lindley, owner of the southwest quarter of said section twenty-two, built one-half of the fence along the northern boundary of his land, established as aforesaid, and Joseph Crawford built the other half of said fence along such line, making a division fence between Crawford and Lindley along the whole of what the said Joseph Crawford, Levi Lindley and S. T. Hanan from their measurements deemed was the boundary line between the northwest quarter of section twenty-two, aforesaid, and the southwest quarter thereof.

"5th. Both Joseph Crawford and Levi Lindley believed said line was the true boundary line between the northwest quarter and the southwest quarter of said section twenty-two; but such line was never surveyed by a surveyor until it was surveyed by Ira Trescott, surveyor, mentioned in the complaint, and the said Trescott varied the line from the

one made by the said Joseph Crawford, Levi Lindley and S. T. Hanan so that the land in dispute according to his survey would be a part of said northwest quarter.

"6th. That such division fence was completed on or before the year 1881, and the said Levi Lindley and said Joseph Crawford in said year 1881 broke out and plowed their said lands up to the fence built by them along what was deemed the north boundary line of said southwest quarter; and their successors have ever since farmed said land up to such fence, including plaintiff and defendant in this action, and each succeeding owner of the northwest quarter, aforesaid, has made valuable improvements upon said northwest quarter until the same is a very valuable farm, and each succeeding owner since Levi Lindley, has made valuable improvements upon the said southwest quarter of said section twenty-two until the same is a very valuable farm. . . .

"8th. The disputed strip of land mentioned in plaintiff's complaint has been in the use of Lindley and his grantor since 1881 as aforesaid, and included within the fences which have enclosed said southwest quarter since 1881."

In the case of *Dyer v. Eldridge,* 136 Ind. 654, 661, 36 N. E. 522, the supreme court of Indiana said:

"The law is that the location of a division boundary fence, acquiesced in and acted upon, and the premises improved up to the line by each, for twenty years, becomes binding as the true line. *Richwine v. Presbyterian Church etc.,* 135 Ind. 80; *Wingler v. Simpson,* 93 Ind. 203, and cases there cited. It is, indeed, axiomatic that acts are stronger talismans of intentions and beliefs than are words, and to them are we to look in settling the question of title. Guided by the evidence in this case, as to the acts performed, and applying the law thereto, the court could not have rendered a different judgment."

In the case of *Fisher v. Bennehoff,* 121 Ill. 426, 435, 13 N. E. 150, the supreme court of Illinois employed this language:

"There can be but little doubt, from the evidence, that Fisher and Mean, in 1845, had a division line run between their respective lands, and established monuments to witness

it, and that all parties interested in the lands acquiesced in the same until some time in 1881, and recognized it as the true boundary line, and built and maintained fences, and cut timber, on the faith that it was such; . . . The adoption of such a line may be implied from acts and declarations, and acquiescence therein; and after the lapse of thirty-five years of uninterrupted acquiescence in the line, under the circumstances, the parties and their privies should be estopped from asserting that it is not the true division line."

In the case of *Hoffman v. White,* 90 Ala. 354, 7 South. 816, the supreme court of that state spoke as follows:

"It may now be conceded that the fence is not, and has never been, on the true line between the lots, but that, on the contrary, it was by mistake placed so as to inclose with lot 32 a strip seven feet in width off the west side of lot 23. Yet, if the erroneous line was *agreed upon by the then proprietors,* as we think the evidence shows, under the belief that it was the correct line, and the owners of lot 32 entered on, and took possession of lot 32, to such conventional line, and held under a claim of right, their possession is adverse in its character to the true owner, and, if continued for ten years, ripens into a perfect title against all the world. *Alexander v. Wheeler,* 69 Ala. 332. It is insisted, however, that the line between these lots was not established by agreement of the parties. We do not concur in this view of the evidence, but the position may be admitted, and the element of contract in the location of the fence be entirely eliminated. The fact would still remain, that the owner of lot 32 *intended* to put the fence on the true line, *believed he* had done so, and his successors for more than ten years held up to the fence, under a claim of ownership hostile and adverse in its character. We do not doubt but that such possession, though not justified by an understanding as to the location of the fence, and originating in a mistake as to the true line, would, if open, notorious, actual and continuous for the statutory period, vest absolute title in the holder."

Under these and many other authorities to the same effect, we think it is well established that where two adjoining landowners locate a division line between their farms and jointly

build a fence thereupon, believing it to be the correct line, when as a matter of fact it is not, and continue said fence as their boundary line continuously for twenty-four years, each continuously occupying, cultivating, and exercising exclusive control and dominion over the land up to said fence, that it must, in the absence of positive evidence to the contrary, be inferred that said line was located and accepted by them pursuant to an agreement that it should be considered and treated as the division line.

In the case of *Suksdorf v. Humphrey, supra,* at page 6, this court said:

"The land being surveyed, the owner must be presumed to know where his lines are, and, if his rights are encroached upon, his right of action will accrue at once."

The lands in question herein had been surveyed by the government prior to the time the division line was marked out and the fence built as hereinbefore stated. If a mistake was made in the location of said division line, the appellant, under the authorities just cited, would be presumed to have known the fact within a reasonable length of time; at least, it was within his power to have so done. Both parties having acquiesced in the line for twenty-four years, it would seem against public policy to say that the statute of limitations should not be available.

The judgment of the lower court is affirmed.

MOUNT, C. J., DUNBAR, CROW, HADLEY, and FULLERTON, JJ., concur.

[No. 6015. Decided March 14, 1906.]

MARY MULLIGAN, *Appellant*, v. THE CITY OF SEATTLE, *Respondent*.[1]

MUNICIPAL CORPORATIONS—STREETS—CLAIM FOR DAMAGES—SUFFICIENCY—DESCRIPTIONS OF LOCATION. A notice of claim for damages sustained through a defective sidewalk sufficiently complies with the charter provision that it "accurately" locate the defect, when the place is described as on the south side of Bay street between First and Western avenues, thereby locating the same within the distance of one block, and where an examination of the location would have revealed such a defect as that described in the notice.

Appeal from an order of the superior court for King county, Albertson, J., entered June 12, 1905, granting a new trial for error of law, after a verdict in favor of the plaintiff, in an action for personal injuries sustained through a defective sidewalk. Reversed.

Wooten & Welch, and *Brady & Gay (Dudley G. Wooten*, of counsel), for appellant, cited: *Norwood v. Sommerville*, 159 Mass. 105, 33 N. E. 1108; *Veno v. Waltham*, 158 Mass. 279, 33 N. E. 398; *Cross v. Elmira* 33 N. Y. Supp. 947; *Owen v. Ft. Dodge*, 98 Iowa 281, 67 N. W. 281; *Hein v. Fairchild*, 87 Wis. 258, 58 N. W. 413; *Duncan v. Grand Rapids*, 121 Wis. 626, 99 N. W. 317; *Hunter v. Village of Durand* (Mich.), 100 N. W. 191; *Oesterreich v. Detroit* (Mich.), 100 N. W. 593; *Langley v. City Council*, 118 Ga. 590, 45 S. E. 486, 98 Am. St. 133; *City of Lincoln v. Miller* (Neb.), 96 N. W. 484; *Ruscher v. Stanley*, 120 Wis. 380, 98 N. W. 223.

Scott Calhoun and *Elmer E. Todd*, for respondent, cited: *Mears v. Spokane*, 22 Wash. 323, 60 Pac. 1127; *Butts v. Stowe*, 53 Vt. 600; *Maloney v. Cook*, 21 R. I. 471, 44 Atl. 692; *Kaherl v. Rockport*, 87 Me. 527, 33 Atl. 20; *Borst v. Town of Sharon*, 48 N. Y. Supp. 996; *Rauber v. Wellsville*,

[1]Reported in 84 Pac. 721.

82 N. Y. Supp. 9; *Sowle v. City of Tomah,* 81 Wis. 349, 51 N. W. 571; *Gardner v. New London,* 63 Conn. 267, 28 Atl. 43; *Crocker v. Hartford,* 66 Conn. 387, 34 Atl. 98; *Ehrhardt v. Seattle,* 40 Wash. 221, 82 Pac. 296.

HADLEY, J.—This is a suit to recover damages for personal injuries alleged to have been caused by a defective sidewalk, in the city of Seattle. A trial was had before a jury, and a verdict was returned in favor of the plaintiff. The city moved for a new trial, and the same was granted. The plaintiff has appealed.

It is assigned that it was error to grant the new trial. The order upon the motion for new trial recites as follows:

"The court grants defendant's motion for a new trial on the sole ground that the claim of injuries presented by the plaintiff to the city council of the defendant city of Seattle did not comply with the provisions of the city charter of said city, relative to the presentation of such claims, in that it did not accurately locate the defect which caused the injury to the plaintiff."

With respect to the location of the defect in the sidewalk, the written claim presented to the city, and which was admitted in evidence at the trial, was as follows:

"That on Thursday, July 7, 1904, at or about 11 a. m. of the said day, while Mrs. Mary Mulligan, the claimant herein, was walking on Bay street between First and Western avenues in the city of Seattle, King county, Washington, said street being regularly laid out by the said city as a public thoroughfare and used by the people as such thoroughfare, the claimant, Mary Mulligan, while so walking and while upon the south side of Bay street between First and Western avenues, stepped upon the plank that was loose, and the end of it had become rotten and rotten stringers underneath, and as she stepped upon the same, wholly unaware of danger, the plank tipped making the center stringer a fulcrum, and she fell down."

The charter provision of the city upon this subject provides

that "all such claims for damages must accurately locate and describe the defect that caused the injury."

At the trial an objection to the offer of the written claim for damages was overruled; but when considering the motion for new trial, the court adopted a different view. The only question involved in the appeal is, was the description sufficiently accurate to comply with the terms of the charter? The notice locates the place on the south side of Bay street between First and Western avenues. The side of the street is definitely stated, and it is conceded that the location is otherwise placed within the distance of one block. A more definite statement would seem to have called for measurements, and we do not think the charter term "accurately" should be construed as requiring such exactness. It should receive a reasonable interpretation, and the purpose of the provision evidently is that the city shall be advised with reasonable certainty of the place, and may thereupon make examination with a view to ascertaining for itself the facts with reference to the alleged injury. An examination of the limited extent of the block mentioned would have revealed such a defect as that described.

Respondent argues that the claim was not presented to the city until the 29th day after the accident, and that the condition of the sidewalk in the block may have changed within that time. It was, however, filed within the time permitted by the charter, and in law it must therefore be presumed to have given the city ample time for proper investigation. In the late case of *Hammock v. Tacoma,* 40 Wash. 539, 82 Pac. 893, the place of injury was designated in the notice to the city as between South Forty-first and South Forty-second streets. An affidavit accompanying the notice stated that it was about half way between those two streets. The fact is, however, that Forty-second street does not extend to the street upon which the place of the defect was located, but ends at a point four blocks distant therefrom. An attempt to locate

the place strictly with reference to Forty-second street, as described in the notice, would have failed, because there was no such street there. The next street south of Forty-first street in that locality is Forty-third street, but it was held that the notice was sufficient, inasmuch as it informed the city that the place was at some point south of Forty-first street, and that it was reasonable to conclude from the notice that the place was between Forty-first and the next street.

Respondent argues that the notice in that case described the place as half way between the streets, whereas in the case at bar it was not limited to any particular portion of the block. But in the former case, if exact statement had been required, there could have been no location found strictly conformable to the notice. The Tacoma charter requires that the location shall be stated "so far as practicable." We see no essential difference between the two charter provisions. Both evidently mean that a reasonable degree of accuracy shall be used. We think that in principle the case cited should not be distinguished from the one now before us. It is due the trial court to say that the *Tacoma* case was decided since the judgment was rendered in this cause.

The judgment is reversed, and the cause remanded, with instructions to vacate the order granting a new trial and enter judgment upon the verdict for appellant.

MOUNT, C. J., FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5751. Decided March 15, 1906.]

C. H. Frye, *Relator and Respondent,* v. The Town of Mount Vernon *et al., Appellants.*[1]

Municipal Corporations—Local Improvements—Reassessments—When to Be Made—Mandamus to Compel—Limitation of Actions. The right of a city to make a reassessment for local improvements being barred by the statute of limitations by the lapse of ten years after the first assessment is declared void, a proceeding by the holder of warrants to compel the city by mandamus to make a reassessment is barred by the lapse of the same length of time.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered January 31, 1905, upon findings in favor of the plaintiff, after a trial on the merits, in a proceeding by a warrant holder to compel a city to make a reassessment to pay the cost of a local improvement. Reversed.

Dave Hammack and *Smith & Brawley,* for appellants.

Million & Houser, for respondent.

Crow, J.—This is a proceeding by mandamus to compel appellants, as councilmen of the town of Mount Vernon, to reassess certain real estate for the purpose of creating a special fund to pay outstanding warrants held by respondent, which had been issued to pay for the improvement of Third street, in said town, and which were unpaid for want of funds.

Upon trial, the court, at the request of respondent, made findings of fact from which it appears, that said town is a municipal corporation of the fourth class; that appellants are the elected, qualified, and acting members of the town council; that on November 19, 1890, an ordinance was passed directing the grading, and sidewalking of Third street; that in pursuance of such ordinance, said street was graded and sidewalked; that, for the purpose of paying the cost thereof,

[1]Reported in 84 Pac. 864.

an assessment was levied against the lots and lands abutting upon said street; that certain warrants held by respondent for the sum of $550.12, principal, were issued by said town in payment for said improvements; that said warrants were presented to the treasurer and by him indorsed, "Not paid for want of funds;" that on or about the 20th day of March, 1893, said town brought an action, No. 1841, to foreclose its assessment lien upon certain real estate on said street; said action being against Charles F. Whittlesey and wife, as owners of a lot subject thereto; that in said action the superior court of Skagit county, on November 9, 1893, adjudged said assessment to be void; that the relator is the owner and holder of the warrants mentioned in his affidavit, which are wholly unpaid; that relator had, at various times, demanded that the council make a reassessment, and that it delayed taking any action until December 21, 1904, when it refused to proceed. Exceptions were taken to most of these findings, but for the purposes of this opinion we will accept them as being sustained by the evidence.

Appellants requested certain findings, which were refused. We think the following facts requested by them should have been found by the trial court, and we now find the same from the evidence; that in said foreclosure action, No. 1841, prosecuted by said town against Whittlesey and wife, trial was had upon the issues joined; that plaintiff produced its evidence, after which the defendants moved for a nonsuit, and a judgment of nonsuit was entered on November 9, 1893; that more than eleven years have elapsed since the entry of said judgment; that neither the town of Mount Vernon nor any of the predecessors in office of appellants have ever taken any further action or proceedings to collect the relator's warrants, either by attempting to enforce the old assessment or by making a reassessment, which facts have always been well known to respondent; that on the 14th day of July 1897, respondent instituted in the superior court of Skagit county

an action upon the identical warrants upon which this application is predicated; that in said action respondent alleged that the statute of limitations had run against the collection of said warrants by reassessment, and that said town was without power to collect the same; that all the owners of lots fronting on said Third street which would be liable for reassessment in case one is now made will plead the statute of limitations as a defense thereto, and that respondent has been guilty of laches and negligence, and has slept upon his rights for more than ten years. Conclusions of law were made in favor of respondent, and a final judgment was entered, directing a peremptory writ of mandate to issue, requiring appellants to make said reassessment. From said final judgment this appeal has been taken.

The only assignment of error we will consider is that the court erred in refusing to enter judgment in favor of appellants, this proceeding not having been commenced within the time limited by law. In discussing this question, it must be remembered that said street improvement was made about November, 1890; that the attempted special assessment made to pay its cost became delinquent September 3, 1891; that on March 9, 1893, in said cause No. 1841, said special assessment was adjudged to be void; that on July 14, 1897, respondent instituted his action No. 3203, to recover on his warrants, alleging that the town of Mount Vernon had wholly neglected to levy any assessment upon the property benefited by said improvement, had wholly failed to provide any fund for the payment of said warrants, and that it did not then have, and never had, any fund set aside or created for their payment; that it had never created or levied any valid assessment; that it had exhausted its power to make or levy an assessment; and that the time for the collection of an assessment against the property benefited by said improvement was barred by the statute of limitations. It will thus appear that on December 22, 1904, when respondent, as relator herein,

filed his original affidavit asking a writ of mandamus, a period of over thirteen years had expired since the original assessment now claimed to be invalid had become delinquent; that a period of more than eleven years had expired since, as respondent now claims, said original assessment was adjudged to be void, and a period of more than seven years had expired since respondent instituted his action upon his warrants. In his affidavit respondent, as relator below, utterly fails to allege or show that he did not at all times have actual notice or knowledge of all or any of these various proceedings.

In *Lewis v. Seattle,* 28 Wash. 639, 69 Pac. 393, this court, speaking by Fullerton, J., said:

"There is no special statute limiting the time for making a reassessment after the original assessment has been adjudged void, but, if it be admitted that the statute limiting the time in which an action may be commenced to enforce an assessment after it has been levied applies to the right of the city to make the assessment, the statute had not run between these dates, as the right of action is limited to ten years. Laws 1895, p. 270."

Appellants here insist upon their right to plead said statute of 1895 against this proceeding instituted by the respondent to secure a writ of mandate. It was shown by the evidence of owners of property subject to reassessment, that upon an attempt being made by the municipality to collect such reassessment, they will plead the statute of limitations. No question can arise but that a period of more than ten years has expired not only since the original pretended assessment became delinquent, but also since, as claimed by respondent, it was adjudged to be void. There must be some limit to the time within which a municipal corporation can be permitted or required to make a reassessment. In *State ex rel. Hemen v. Ballard,* 16 Wash. 418, 47 Pac. 970, a proceeding by mandamus to compel a reassessment, Gordon, J., said:

"The argument is that the collection of these assessments cannot be enforced by the city in a direct suit against the

abutting property, because the bar of the statute is complete. We are of the opinion that the statute of limitations does not begin to run until a right of action exists, and it follows from what has been already said that no right of action existed in the town of Ballard to enforce these assessments prior to the going into effect of the act of March 9, 1892, legalizing and validating the incorporation or reincorporation of cities and towns. That act had no emergency clause, and hence, under the constitution, did not go into effect until June 7, 1893. So that, clearly, the statute of limitations could not and did not begin to run until said last mentioned date, viz., June 7, 1893. It may be conceded that the statute of limitations then in force, as applied to actions to enforce assessments, required the action to be brought within two years. *Spokane v. Stevens,* 12 Wash. 667 (42 Pac. 123). But, by the passage of the act approved March 20, 1895, which by reason of its emergency clause went into effect on that day, it was provided that all actions to collect special assessments for local improvements of any kind, or to enforce any lien for special assessments, might be commenced 'within ten years after said assessment shall have become delinquent or due.' Session Laws 1895, p. 270."

See, also, *Bowman v. Colfax,* 17 Wash. 344, 49 Pac. 551.

In *Young v. Tacoma,* 31 Wash. 153, 71 Pac. 742, Hadley, J., said:

"The statute of limitations is also urged. The original assessment was confirmed in 1894. The limitation at that time, as construed by this court in *Spokane v. Stevens,* 12 Wash. 667 (42 Pac. 123), was two years. In 1895 a ten-year limitation act was passed, which went into effect prior to the expiration of two years from the confirmation of the first assessment. The statute was therefore extended, and this proceeding is not barred. *State ex rel. Hemen v. Ballard, supra; Bowman v. Colfax,* 17 Wash. 344 (49 Pac. 551)."

From the above expressions of this court, we think the limitation of ten years fixed by the statute of 1895 applies to a case of this character, and so hold. Assume that the town council of Mount Vernon should, of its own motion, make a reassessment to pay these warrants, the original assessment

having been delinquent for more than ten years, would it be contended that the owners of property assessed could not plead the statute of limitations when the municipality endeavored to enforce its lien? To say they could not plead the statute would be to hold that the council could delay making a reassessment for any indefinite period of time, and yet hold that whenever any council at a later date might perchance be seized with an inclination or desire to reassess, they could and would be permitted to do so, without regard to lapse of time. We do not think this could be permitted. But if, after the lapse of ten years, the council could not make a valid reassessment of its own motion, it will not be required to do so by a peremptory writ of mandate.

Respondent contends that appellants, as councilmen of the town of Mount Vernon, should not be permitted to plead the statute of limitations, that right being a privilege resting only with the property owners who might or might not avail themselves of it. We think there is no merit in this contention. It has been shown that the property owners will plead the statute in the event of any effort on the part of the town authorities to enforce a reassessment. Such a plea would necessarily be successful. Hence a refusal to sustain the plea when made by appellants and the granting of a writ of mandate herein would only result in subjecting the municipality to vexatious, unnecessary, and profitless litigation. This should not be permitted, the respondent having been guilty of neglect and laches sufficient to deprive him of any right to a writ of mandate herein.

The judgment is reversed, and the cause remanded, with instructions to dismiss.

Mount, C. J., Fullerton, Hadley, Root, and Dunbar, JJ., concur.

[No. 5946. Decided March 15, 1906.]

FANNIE TURNER, *Respondent*, v. WILLIAM M. LADD *et al.*, *Appellants*.[1]

QUIETING TITLE—EVIDENCE OF TITLE—SUFFICIENCY. As against title by patent from the government, and regularly executed mesne conveyances, oral evidence of a conveyance from one, as agent, who never had record title, and denied by the agent, is insufficient to establish title.

TAXATION — TAX TITLE — FRAUDULENT ASSESSMENT. A tax title resting upon an assessment fraudulently procured to be made to one not the owner, when the property had been already assessed and the taxes paid, is void.

ADVERSE POSSESSION—WHEN NOT CONTINUOUS—EVIDENCE—SUFFICIENCY. Title cannot be acquired by adverse possession from the fact that the plaintiff in 1875 constructed a fence from one inlet of Puget Sound to another, inclosing part of the land with some of his own, and that he logged the land at that time, where, for more than twenty years last past, it has been vacant and unoccupied by any one.

DEEDS—BOND FOR DEED—AFTER-ACQUIRED TITLE. A bond for a deed, made by a patentee prior to the issuance of a patent, is not a conveyance, and is insufficient to pass an after-acquired title.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered April 24, 1905, upon findings in favor of the plaintiff, after a trial before the court without a jury, in an action to quiet title. Reversed.

M. G. Royal, King & King, and *Troy & Falknor,* for appellants.

G. C. Israel, for respondent.

PER CURIAM.—The respondent brought this action against William Ladd and others, to quiet title in herself to lot two, of section twenty, in township nineteen, north, of range two, west of the Willamette meridian. A decree adjudging her to be the owner in fee of the premises, and quieting her title

[1]Reported in 84 Pac. 866.

thereto was rendered by the trial court, and the defendants Ladd and wife appeal therefrom.

The respondent claimed title by virtue of a deed from her father. The father claimed title through three sources: the first by reason of having purchased the property from one George Barnes, who, he testified, then claimed the right to sell it as the agent of the true owner; the second, by reason of having purchased it at a tax sale; and the third, by virtue of the statute of limitations. The appellants Ladd and wife showed title through a regular chain of mesne conveyances from the government of the United States to themselves.

We shall not comment at any length upon the evidence thought to sustain the respondent's claim of title, but a careful examination of it has convinced us that her claims are unfounded. The alleged purchase from Barnes rests on the naked statement of the father. No conveyance, contract, or writing of any kind is produced to evidence the sale, and Mr. Barnes himself denies making it. The title never stood of record in Mr. Barnes, nor is there anything of record showing that he had a right to make a contract concerning it. This character of evidence is not sufficient to overthrow a title derived from the government, and evidenced by mesne conveyances regularly executed and duly recorded.

The claim through a tax deed has no better foundation. B. B. Turner caused the property to be assessed to himself, suffered the same to become delinquent, and then procured a friend to buy it for him at a sheriff's sale. In the meantime, however, the land had been regularly assessed to its true owner, and the taxes paid by such owner before they became delinquent. It is perhaps needless to add that Mr. Turner could acquire no title to the property by this transaction. So palpable a fraud cannot be the foundation of any legal right.

The claim based on the statute of limitations is likewise without conclusiveness, although it has more merit than the

claim just noticed. The land in question borders on Puget Sound, and Mr. Turner owns land in its vicintiy. As early as 1875, Turner caused a fence to be constructed from one inlet of the Sound to another, and in doing so inclosed with some of his own land a small part of the land in dispute. Mr. Turner also claims to have constructed some log ways across it, and to have logged the land in 1875 or 1876, and contends now that he always claimed to own it. It appears, however, that the fence was long since destroyed, and that, for nearly if not quite twenty years last past, the land has been open to the commons no more in the possession of the respondent and her predecessor in interest than in the possion of any one. True, Mr. Turner has intermittingly caused the land to be assessed to himself, and had paid taxes upon it; but the land was also assessed regularly to the record owner, and he likewise has paid the taxes thereon. We think, therefore, that title cannot be claimed by virtue of the statute of limitations.

The respondent claims further that the evidence introduced by the appellants shows that the patentee from the government parted with his title prior to the time he conveyed to the person through whom the appellants claim title, and hence, the appellants are mere strangers to the title asserting ownership, and as against them the respondent has made out a case of adverse possession. But counsel mistakes the effect of the instrument he denominates a conveyance. It was nothing more than a mere bond for a deed, executed prior to the time the obligor obtained his title from the United States and could not operate to pass any subsequently acquired title.

The judgment appealed from is reversed, and remanded with instructions to enter a judgment to the effect that the respondent, plaintiff below, take nothing by her action, and that the defendants go hence with their costs.

[No. 6005. Decided March 15, 1906.]

J. P. BUELL, *Respondent*, v. CAROLINE BUELL, *Appellant*.[1]

DIVORCE—ABANDONMENT—EVIDENCE—SUFFICIENCY. The findings of the trial court in granting the husband a divorce on the ground of abandonment will not be disturbed on appeal where it appears that the wife refused to live with him, although often requested to do so, giving as a reason that he could not properly provide for her and that she did not feel safe by reason of his bad treatment of her; especially when the trial judge had the advantage of seeing the parties and witnesses.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 28, 1905, upon findings in favor of the plaintiff granting a divorce, after a trial before the court without a jury. Affirmed.

A. H. Gregg and *Moore & Husbands*, for appellant.
Del Cary Smith, for respondent.

PER CURIAM.—Respondent and appellant had been married for many years, during which period they had occasional difficulties. After one of these disagreements, appellant told respondent to leave the house, take his trunk, and not return; and stated to him that she would not again live with him. They were then living in Spokane. Subsequently respondent obtained employment at Liberty Lake, some distance from Spokane, and requested appellant to go there and reside with him. She refused, and has continuously since refused to do so, claiming that she did not think he was able to properly take care of her, and that she was afraid to live with him in the absence of some of her children. Respondent brought this action for divorce upon the ground of abandonment. The trial court made findings of fact and conclusions of law in his favor, and a decree granting him a divorce was thereupon entered. From this an appeal is taken.

[1]Reported in 84 Pac. 821.

It is admitted that appellant told respondent she would not again live with him, and that she has continually ever since refused to live with him. There was evidence of disagreements and quarrels at various times throughout a period of many years. She testified that he had repeatedly struck her, and that he had abused her in many ways. He denied this emphatically.

It is doubtless the law that the husband has the right to choose the domicile for the family, and that it is the duty of the wife to accompany and live with him in the home thus selected, unless there be good reasons for her not so doing. In this case the only reason assigned by appellant for not living with respondent was that she did not think he could properly provide for her, and that by reason of his bad treatmen of her theretofore she did not feel safe in living with him in a locality where members of her family were not near at hand. They had several children, all grown. As to whose fault their frequent disagreements were attributable was a question of fact to be determined upon conflicting testimony, as were also the questions of his alleged mistreatment of her, and of his ability to properly support her. We do not think the respondent made out a strong case; but the trial judge had the advantage of seeing the parties and their witnesses, of hearing them testify, and of observing their demeanor upon the witness stand, and was in a better position to determine the facts than are we. For this reason the majority of the court feel that the judgment of the superior court should be affirmed, and it is so ordered.

[No. 5875. Decided March 15, 1906.]

Steven Breckenridge, *a Minor etc., Respondent,* v. American Eagle Consolidated Mining Company, Limited, *Appellant.*[1]

Master and Servant—Negligence—Premature Blast—Proper Torch—Evidence of Negligence—Sufficiency. In an action to recover for personal injuries sustained by an employee in setting off a blast, the evidence is insufficient to show negligence of the master in furnishing an unsafe torch for igniting the fuse, in that it could not be told when the fuse was ignited, where the plaintiff testified that he had used such torch for several weeks with absolute safety, and had always known when the fuse was ignited, and an expert witness for the plaintiff admitted on cross-examination that such fact could be known by paying attention.

Same—Contributory Negligence—Evidence—Sufficiency. In an action for injuries sustained by an employee through a premature blast, the plaintiff is shown to have been guilty of contributory negligence, where it appears that he set off the blast without having filled the hole, as should have been done, leaving it open with the powder exposed to the sparks from the fuse, and that he tamped the powder with an iron spoon, contrary to instructions, and where it appears that the blast exploded almost immediately after lighting the fuse, and that the fuse spits fire or sparks which might have fallen on the powder.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered January 3, 1905, upon the verdict of a jury rendered in favor of the plaintiff, an employee injured by a premature explosion of a blast. Reversed.

R. J. Danson, for appellant.

Hoyt & Dirks, for respondent.

Crow, J. — This action was commenced by respondent Steven Breckenridge, a minor, by W. H. Coburn, his guardian *ad litem,* against appellant, American Eagle Consolidated Mining Company, Ltd., a corporation, to recover damages for personal injuries.

[1]Reported in 84 Pac. 858.

In the year 1903 appellant was engaged in the development and operation of a certain mine, near Elk, in the state of Idaho, and employed respondent to perform certain labor in and about said mine. While so employed, respondent was engaged in blasting rock, using giant powder, dynamite, fuses, and other dangerous agencies, when on or about July 31, 1903, a blast was prematurely discharged, causing him to sustain serious injuries.

Respondent, a mature young man, weighing about 175 pounds, of ordinary intelligence, nearly nineteen years of age, had been earning wages in various employments for a number of years, and was earning three dollars per day at the time of the accident. He contends that blasting was no part of his duty, he having been employed to do common labor. While this is true, he had, several weeks prior to his injury, worked for appellant at drilling holes, and preparing and discharging blasts in a tunnel. Afterwards he worked for about three weeks at blowing out large stumps and rock in a roadway, and was blasting rock in an open cut at the time of his injury. In doing this work, he drilled holes under said stumps or in the rock, placed from one to three sticks of powder therein, which he tamped, placed a cap upon the powder, attached a triple tape fuse from 16 to 24 inches in length, and tamped dirt around said fuse, which he then ignited with a torch. He had been instructed by appellant to make this torch by taking paper wrappers from the powder, attaching them to a stick about two feet in length, and as the paper was saturated with glycerine, ignite it, thus providing a torch with which he could light the fuse. This being done, it was his duty to withdraw to a place of safety before the burning fuse caused an explosion.

Respondent alleged that appellant was guilty of negligence in two particulars: (1) in providing fuse of an unsafe and inferior quality, that was liable to burn too rapidly and cause a premature explosion; (2) in failing to properly instruct respondent, who was inexperienced and not familiar

with his work; also, directing him to use a torch made from the paper wrappers, which he alleged made such a blaze and noise when burning, as to render it impossible for him to know when a fuse was lighted. The first allegation of negligence as to the character of the fuse was withdrawn from the case, by order of the court, and abandoned by respondent, the evidence clearly showing it to have been of the best quality. Upon the trial the court denied appellant's motion for a nonsuit, and also denied its motion for a directed verdict, said motions being based upon the contentions, (1) that no negligence was shown upon the part of appellant; (2) that respondent was guilty of contributory negligence. The jury returned a verdict in favor of respondent for $20,000; this was, by the trial court, with respondent's consent, reduced to $5,000, for which latter sum a judgment was entered, and this appeal has been taken.

Of the several assignments of error, it will be only necessary to consider those based upon the refusal of the trial court to grant appellant's motions for a nonsuit and a directed verdict.

From respondent's testimony it appears that, when he first became an employee of appellant, he was sent to a tunnel to help with certain drilling and blasting and as he expressed it, keep another employee from injuring or killing himself. He went to the tunnel, drilled all night, prepared numerous blasts and discharged them at midnight, and again in the early morning, doing his work in perfect safety and to the complete satisfaction of his employer. Afterwards he was engaged in certain road work, where it became necessary to blast out large stumps and stones, which he did under the instructions and directions of appellant's manager. He was thus employed for about three weeks doing his work successfully and without injury, all the time using a torch made from paper wrappings taken from the sticks of powder.

He testified that he had previously drilled for blasting upon

a railroad; that he knew powder to be dangerous; that if fire came in contact with it, it would burn and explode; that in blasting the stumps he had used the paper torch and always knew when a fuse ignited. He further testified that, at the time of the accident, he had drilled two holes, one in a horizontal position about one foot deep, and one in a vertical position considerably deeper; that he removed the wrappers, placing one stick of powder in the smaller hole and two or three sticks in the larger one; that he tamped the powder with an iron spoon, which was contrary to his intsructions, he having been ordered to use a stick; that he placed a cap on each charge of powder, attached a fuse about eighteen inches in length, then tamped dirt into the horizontal hole, filling it to the surafce, but did not tamp any dirt into the vertical hole, leaving it open with the powder exposed. He then prepared and lit his torch, which he applied to the fuse in the open hole. Seeing that this fuse was burning he took one step aside for the purpose of igniting the other fuse, when the first charge exploded, causing him serious injury. The blast not lighted was found to be in proper condition, and was discharged sometime after the accident. The charge which exploded was the one not tamped with dirt, which the testimony shows should have been done.

We have carefully examined the evidence, and are unable to find that it supports respondent's contention to the effect that the torch was an improper, unsafe, or dangerous contrivance. On the contrary, it was shown to have been in common use with experienced and careful miners. It is true that respondent attempted to claim the contrary in his evidence, still he admits that he had used it with absolute safety for several weeks prior to the accident, and always knew when a fuse was ignited by it. One Malloy, a witness for respondent, first stated that he thought the torch would keep respondent from knowing whether the fuse was lighted, but admitted he never tried it. After experimenting with a fuse in the court room, he testified as follows:

"Q. Do I understand you to say that a person can take a fuse like that and cannot tell whether the fuse was set off or not? Will you cut another piece of fuse, please? (Witness illustrates with burning fuse again.) Q. Any man would know whether that fuse was burning or not, wouldn't he? A. Why, yes, I guess he would. . . . Q. So that a person could hardly miss knowing that the fuse was on fire? A. No, not if he watched his fuse. Q. Well, if he paid any attention he couldn't help but know it. A. Yes, sir, you have to pay attention, it is a thing worth watching, you cannot light it by random."

There can be no question but that respondent utterly failed to show any negligence upon appellant's part in instructing him to use the wrappers, which his own evidence showed were not dangerous, as he would have no difficulty in knowing when the fuse was lighted.

It is unnecessary to enter into a detailed discussion of the evidence. There is an utter absense of proof showing any negligence upon the part of appellant, while respondent's own testimony shows the accident to have been the result of his negligence in not tamping dirt into the hole in which he had placed the larger blast, the one which exploded. He admits he used an iron spoon in tamping the powder, and that he might have smeared it along the sides of the hole which he had drilled. It is undisputed that when a fuse ignites it immediately spits fire or sparks, and that if one of these sparks should come in contact with the powder an immediate explosion might result. The theory of appellant, which we think the evidence sustains, is that a spark from the fuse fell into the open hole, struck the powder, and caused a premature explosion before the fuse could have otherwise burned its entire length. In order that respondent may recover, it is not sufficient to merely show the premature explosion and his injuries, but a further showing must be made of some negligence on the part of appellant as the proximate cause of the accident, without contributory negligence on the part of respondent. No negligence of appellant being shown, and

contributory negligence appearing indisputably on the part of respondent, no recovery can be had herein.

The judgment is reversed, and the action dismissed.

MOUNT, C. J., ROOT, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

[No. 5971. Decided March 15, 1906.]

S. E. HANNA, *Plaintiff and Appellant,* v. M. D. HAYNES *et al., Defendants and Appellants.*[1]

BROKERS—CONTRACTS FOR COMPENSATION—RESCISSION FOR FRAUD OF AGENTS—EQUITY. One who has availed herself of the services of real estate agents in the purchase of property, resulting in large profits, is not entitled to rescission of a contract to compensate the agents by dividing the profits by reason of the constructive fraud of the agents unless she first do equity by giving the agents a reasonable compensation for the services performed by them.

SAME—CONSTRUCTIVE FRAUD—EVIDENCE—SUFFICIENCY. Where real estate brokers, who have been acting as confidential agents of a client, purchase certain property for her, representing that the owner is unwilling to pay any commissions, and agree in lieu of commissions to effect a resale and share equally in the profits, it is a constructive fraud upon the client for the brokers to accept part of the commissions paid by the owners, warranting a court of equity, in the interest of public policy, in cancelling the contract to share the profits on a resale; and the burden of proof being upon the brokers to establish the fairness of the transaction, findings establishing constructive fraud will not be disturbed on appeal in the absence of satisfactory proof.

Cross-appeals from a judgment of the superior court for King county, Gilliam, J., entered July 15, 1905, upon findings made by the court after a trial on the merits without a jury, in an action for the rescission of a contract, decreeing an accounting and a conditional cancellation of the contract in suit. Affirmed.

[1]Reported in 84 Pac. 861.

Fred H. Peterson, R. A. Hulbert, and *H. C. Force,* for plaintiff.

McClure & McClure, for defendants.

HADLEY, J.—This action involves a somewhat complicated controversy concerning the services of real estate brokers. The action was originally brought by the plaintiff, S. E. Hanna, against the defendants M. D. Haynes and Charles Cowen, as copartners, under the firm name of Haynes-Cowen Company. The complaint alleged that the plaintiff employed said Haynes as her broker and confidential agent for the purpose of purchasing real estate for her, and that she reposed special confidence and trust in him; that in March, 1904, he represented to plaintiff that he could purchase for her the east half of the westerly half of lots 2 and 3, in block 26, of A. A. Denny's addition to Seattle, for the sum of $10,000; that said sum was the net purchase price to the owner; that he, Haynes, represented to plaintiff that he would negotiate the purchase of the property for plaintiff, and that, inasmuch as the owner would pay no commission, he, Haynes, would accept in full for his services one-half of the net profits that should result from such purchase in the event of a resale of the property; that, relying upon such representations, the plaintiff so agreed with said Haynes, and thereupon a written memorandum to said effect was drawn and signed by the plaintiff and by Haynes-Cowen Company. This written memorandum also recites that Haynes-Cowen Company will endeavor to get options on the remaining portions of said lots, and that any profits arising from the sale of any portion of the lots shall be equally divided between the plaintiff and Haynes-Cowen Company. It is alleged that the plaintiff, through said defendants, thereupon purchased the portion of said lots above particularly described, for the sum of $10,000; that in February, 1905, the plaintiff, for the first time, learned that the representations so made by said Haynes were untrue, and were made for the purpose of deceiving

her, and to induce her to enter into said agreement; that in truth said defendants, at the time plaintiff purchased the property, were the agents and brokers of the vendor, and were paid by him the sum of $500 for effecting the sale to plaintiff; that, upon learning such facts, plaintiff refused to ratify or abide by the agreement, and still refuses. She asks that the agreement be declared void, and that it shall be cancelled.

Haynes-Cowen Company answered the complaint, and also interposed a cross-complaint, to the following effect: That, out of the $10,000 purchase price for said property, defendants paid a commission of $500; that they immediately took steps, in accordance with their agreement with plaintiff, to procure options upon the remaining portions of said lots, and did procure such option upon the west half of the westerly half thereof, and that the same was afterwards purchased, title thereto being taken by the plaintiff; that the purchase price therefor was $13,000, and that the same was obtained in the following manner, to wit: The south half of the west half of lot 3 was sold by plaintiff and defendants for $10,000, and the plaintiff furnished the additional $3,000; that defendants had full charge of all said negotiations; that plaintiff has invested the sum of $13,000, and that there remains unsold the north half of the west half of lot 3, and the west half of lot 2, the value of which is $40,000; that defendants' interest therein is of the value of $12,500. At the trial, to conform to certain testimony as to value, the cross-complaint was amended so as to state the full value as $56,000, and defendants' interest therein as $21,500. It is alleged that plaintiff is endeavoring to defraud the defendants of their interest in the property, and has refused to account to them. The cross-complaint asks for the appointment of a receiver to sell the property and divide the proceeds according to the terms of said agreement.

The copartnership of Foster-Knipe Company filed a complaint in intervention, also making one L. B. May a defend-

ant thereto. The interveners allege that the owner of the first tract purchased by plaintiff had placed the property with them for sale at the price of $10,000, out of which they were to receive a commission of $500; that they authorized said May to procure a purchaser at said price, in which event he should have one-half of such commission; that May secretly placed the property in the hands of Haynes-Cowen Company, who effected the sale to plaintiff; that May has not accounted to interveners for their share of said commission; that May arranged with Haynes-Cowen Company to share equally with the latter in their interest arising from the resale of the property, and the interveners ask that they shall be declared to be the owners of an undivided half of that interest, and that said May and Haynes-Cowen Company shall be held to be the owners of the other half. May answered the complaint in intervention with denials, and also filed a cross-complaint against Haynes-Cowen Company, claiming a half interest with them in the profits accruing to them from the resale of the property.

The various conflicting claims as above shown were heard by the court at the trial, and a judgment was rendered with respect thereto. The judgment provides that, if the plaintiff shall, within thirty days, pay into the registry of the court $1,575, then the agreement between her and Haynes-Cowen Company shall be cancelled; that if she shall not so pay said sum, then an accounting shall be taken between the parties as to the profits arising from the purchase and sale of said property, and the same shall be divided as follows: The profits from the west half of the west half of said lots to be divided equally between the plaintiff and Haynes-Cowen Company, and those arising from the east half of the west half of the lots shall be divided as follows: One-half to plaintiff, one-fourth to Haynes-Cowen Company, one-eighth to Foster-Knipe Company, and one-eighth to L. B. May. It is further provided that in case $1,575 shall be paid into the registry of the court as aforesaid, then $1,450 thereof shall

be paid to Haynes-Cowen Company and $125 to Foster-Knipe Company; and in such case it is also provided that Foster-Knipe Company shall have judgment against L. B. May for $125. No costs were awarded to any of the parties. The plaintiff, Hanna, and the defendants Haynes-Cowen Company have appealed. The other parties to the judgment are making no contention against it in this court.

The contention of appellant Hanna is that it was error to award appellants Haynes-Cowen Company any relief whatever; while the latter contend that they should have been awarded the full one-half interest in all profits arising from the purchase and sale of all of said property. The court found that Haynes-Cowen Company were the agents of appellant Hanna, and that they were guilty of constructive fraud in concealing from her the fact that they received $250 of the $500 commission paid by the vendor on account of the first sale. It was, however, the view of the court that, notwithstanding such constructive fraud should operate to cancel the agreement between appellant Hanna and Haynes-Cowen Company as to division of profits from the property purchased and sold, still, under all the attending circumstances, she must do equity before she is entitled to such cancellation. The evidence shows that, in pursuance of said agreement, Haynes-Cowen Company procured options upon other property than that which was first bought, which resulted in additional purchases by appellant Hanna; that the negotiations were all conducted by Haynes-Cowen Company; that the latter took charge of said property, collected rents, paid assessments, arranged for water and sewer connections, looked after assessments for sewers, water mains, sidewalks, regrading the streets, and other municipal assessments upon the property; that at the time of the commencement of this action, of the property so procured for appellant Hanna she still held the title to the west half of lot 2, and the north half of lot 3, and that the same has since been sold for $36,000, a net profit of $20,000 being realized therefrom; that

the services of Haynes-Cowen Company have resulted in very great profit to appellant Hanna, and are reasonably worth $1,575, the same being itemized in the findings.

The court therefore held that, to entitle her to the cancellation of the agreement, she must pay the above sum as the reasonable value of services which resulted in such great profit to her. We think this was not error. The amount found by the court is not unreasonable under the testimony. It is a well settled principle that he who seeks the aid of a court of equity must do equity. He cannot retain what he has received from another in pursuance of a contract and at the same time ask the rescission in full of such contract. He must at least offer to restore the status of the parties as it was prior to the contract. Appellant Hanna has received and accepted the benefit of the services of Haynes-Cowen Company. She must therefore restore the value of those services before she is entitled to a rescission of the contract. 1 Pomeroy's Eq. Jurisp. (3d ed.), § 385; *Lane v. Latimer,* 41 Ga. 171; *Anderson v. Anderson Food Co.* (N. J.), 57 Atl. 489; *Sullivan v. California Realty Co.,* 142 Cal. 201, 75 Pac. 767; *Alexander v. Wallace,* 18 Tenn. 104; *Starrett v. Keating,* 61 Ill. App. 189; *Nutter v. O'Donnell,* 6 Colo. 253; *Byars v. Spencer,* 101 Ill. 429, 40 Am. Rep. 212.

For the foregoing reasons, appellant Hanna cannot prevail in her appeal, and we will now examine the appeal of Haynes-Cowen Company. It is contended that the court erred in finding that these appellants were guilty of constructive fraud. Mr. Haynes testified that Mr. May brought to his attention the fact that May was authorized to sell the first tract purchased for $10,000, and that the owner would pay from that sum a commission of $500; that he thereupon negotiated the purchase for Mrs. Hanna, paid the vendor $9,500, and offered $500 to Mr. May as his commission for effecting the sale for the owner; that May insisted that he should share with Haynes-Cowen Company in the profits on

resale of the property, and that thereupon $250 of the $500 was paid to May, and the remaining $250 was retained by Haynes-Cowen Company for allowing May an interest in the profits to accrue from resale. May denied the above, and testified that at the time of the purchase he did not know that the commission was collected by Haynes-Cowen Company, as the agreement had been to share in the profits as their compensation; but that he did afterwards accept $250 of the commission.

The court found that May refused to accept the $500, and demanded a half interest in the profits to be derived from resale; that Haynes-Cowen Company agreed with him that they would retain $250 of said commission, and would give him a one-half interest in the selling profits. The court did not find that an interest in the profits was sold to May for the $250, as testified in effect by Haynes; but simply that one-half of the commission was retained and that May was also to share in the profits. The finding as made does not necessarily conflict with May's testimony that an agreement was made, before the purchase was made, that they should share in the profits as their compensation for the deal.

It was further found that, by reason of the confidential relations between Mrs. Hanna and Haynes-Cowen Company as her agents, it was constructive fraud to conceal from her the fact that they received $250 of said $500. These appellants contend that it was error to find that the relation of principal and agent existed, and they insist that the relation was that of partnership. We think, however, that the court's finding in that regard was amply justified. That being true, we also think that, in the interest of clean, wholesome dealing between persons sustaining confidential relations, the further finding that there was constructive fraud was also justified. When all is said, the fact remains that Haynes-Cowen Company received $250 of the commission paid by the vendor for selling the property to Mrs. Hanna, and whatever may have been the circumstances by which in their own minds

they justified its retention, they, as her confidential agents, nevertheless concealed the fact from her. They could not share in the compensation paid by the vendor without the knowledge of the vendee and at the same time render the highest and best services for the vendee whose confidential agents they were. In the interest of public policy, a contract made under such circumstances may be avoided. 4 Am. & Eng. Ency. Law (2d ed.), 984, 985; *Shepard v. Hill,* 6 Wash. 605, 34 Pac. 159; *Cannell v. Smith,* 142 Pa. St. 25, 21 Atl. 793, 12 L. R. A. 395; *Leathers v. Canfield,* 117 Mich. 277, 75 N. W. 612, 45 L. R. A. 33; *Collins v. McClurg,* 1 Colo. App. 348, 29 Pac. 299; *Rice v. Davis,* 136 Pa. St. 439, 20 Atl. 513, 20 Am. St. 931; *Van Dusen v. Bigelow* (N. D.), 67 L. R. A. 288. In such case the burden of establishing perfect fairness and equity is upon the agent, and in the absence of satisfactory proof, courts of equity treat the case as one of constructive fraud. *Condit v. Blackwell,* 22 N. J. Eq. 481.

For the foregoing reasons, we think the appeal of Haynes-Cowen Company must also fail, and the judgment of the trial court is affirmed. Since neither appeal is sustained, no costs shall be recovered by either party in this court.

MOUNT, C. J., FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5961. Decided March 15, 1906.]

W. W. LAIDLAW, *Appellant,* v. PORTLAND, VANCOUVER AND YAKIMA RAILWAY COMPANY *et al., Respondents.*[1]

MECHANICS' LIENS — LABORERS UPON RAILROAD CONSTRUCTION — PROVISO FOR CONTRACTOR'S BONDS—LIABILITY OF RAILROAD ON FAILURE TO TAKE BOND—STATUTORY CONSTRUCTION. By the act of 1893, p. 32, § 1 (Bal. Code, § 5900), entitled an act providing for the enforcement of liens, without any mention of the provision relating to bonds of contractors, which provides for liens for labor upon specified classes of property, with a proviso to the effect that railroad companies letting work to contractors shall take a bond for the protection of laborers and materialmen, and in case of failure so to do, the company shall be liable to the full extent of such debts contracted by such contractor, construing all the provisions of the act together, the proviso was intended as an exception to the body of the act, whereby the railroad could relieve its property from such liens by the filing of the bond, and it was not intended as an accumulative remedy against the company; hence the effect of failure to file the bond, is to render the railroad property lienable and the company liable over for a deficiency upon perfecting the lien; and the railroad company is not liable to labor claimants unless the liens are perfected.

Appeal from a judgment of the superior court for Clarke county, McCredie, J., entered March 20, 1905, upon sustaining a demurrer to the complaint, dismissing an action to recover from a railroad company the amount of labor claims incurred by a contractor in construction work. Affirmed.

R. A. Leiter, Wm. D. Fenton, and *Donald McMaster,* for appellant.

B. S. Grosscup, for respondents.

HADLEY, J.—This action was brought to recover on account of labor performed in the construction of the railroad of the defendant Portland, Vancouver & Yakima Railway Company. The cause was determined below on demurrer to the complaint. The essential averments of the complaint

[1]Reported in 84 Pac. 855.

may be stated as follows: That the above named defendant is a railway corporation, and that during the times hereinafter mentioned it was engaged in the construction of a railway in Clarke county, in this state; that the defendant the Western Construction Company is also a corporation and that in July, 1901, said railway company and construction company entered into an agreement in writing, whereby the construction company agreed to do certain specified construction work for the railway company, and the latter agreed to pay for the labor and materials necessary for such construction, at certain rates and prices set forth in the contract; that the construction company entered upon the performance of said work, and in the course thereof necessarily employed a large number of persons to labor upon the construction of the railroad, and promised to pay them the reasonable value thereof; that between the first day of October, 1901, and the tenth day of March, 1902, the construction company became indebted to divers persons who so labored, the aggregate amount thereof being $37,268.02; that from time to time the construction company issued time checks to such laborers, aggregating said sum, drawn upon the Commercial Bank of Vancouver; that with the consent of the construction company, the holders of said time checks assigned them to said bank, for value received, and that the bank, also, for value received, assigned and delivered the same to the plaintiff, who is now the owner and holder thereof, and of all demands arising thereon; that an accounting was had between the construction company and said bank, and it was agreed that the above sum was due and owing from the former to the latter, and that no part thereof has been paid, although long since due; that the railway company failed to take a bond from the construction company as required by Bal. Code, § 5900; that thereafter said railway company and the Washington & Oregon Railway Company became consolidated as one corporation, under the name of "Washington Railway & Navigation Company;" that by the terms of such consolida-

tion the new company assumed and became liable for the obligations of the old ones. The Portland, Vancouver & Yakima Railway Company and said new corporation, the Washington Railway & Navigation Company, are joined as defendants with the construction company, and judgment is demanded against them all for the full sum above named, with interest. The two railway company defendants demurred generally to the complaint. The demurrer was sustained, plaintiff refused to plead further, and judgment was entered dismissing the action, from which plaintiff has appealed.

It is assigned that it was error to sustain the demurrer. It is stated in appellant's brief that the trial court's decision was due to its belief that the decision in *Armour & Co. v. Western Construction Co.*, 36 Wash. 529, 78 Pac. 1106, is controlling here. That decision dealt with a constitutional feature of the act of 1893, as found in the session laws of that year at page 32, the title of the act being: "An act creating and providing for the enforcement of liens for labor and material." It was held that that portion of the body of the act which purports to create a liability for failure to take a bond from a railroad contractor conditioned to pay for "provisions" is not sufficiently comprehended in the title. What the court would have held if the controversy had been concerning the failure to take a bond to pay for "labor," since labor is named in the title, does not appear from the decision.

The subject of liability for labor not being involved, the act was not discussed with relation thereto, and the opinion cannot therefore be said to be decisive of this case, which does involve an alleged liability for labor.

The gist of the controversy now before us is whether the entire provision in § 1 of the act of 1893, which provides for the taking of a bond and for consequent liability in the event of failure so to do, is obnoxious to the constitution as being a subject not included in the title of the act. The title is short and specific. It relates solely to the enforcement of *liens* for labor and material. If the body of the act contains

provisions not germane to what is expressed in the title, it is subject to the constitutional objection to the extent of such provisions. It is our duty to construe the statute so as to give force to the whole of it, if there is a reasonable way to so construe it without doing violence to the constitutional rules. In attempting such construction, reference must be had to the whole act, and all its parts must be considered together.

It will be observed that § 1 first provides that, "every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any . . . railroad . . . has a lien upon the same . . ." Section 5 provides that no lien shall exist and no action to enforce the same shall be maintained unless, within ninety days from the date of the cessation of the performance of the labor, the claim for such lien shall be filed for record in the office of the county auditor of the county in which the property to be affected is situated. The complaint fails to show that any lien notices were filed. Appellant construed the statute to mean that when a railroad company has contracted with any person for the construction of its road, and has failed to take a bond conditioned that such person shall pay all laborers, then an action shall lie directly against the railroad company, and that no notices of liens are necessary. The title of the act is, however, confined to the enforcement of liens, which subject relates solely to a remedy against specific property, and if the act shall be construed as adding a cumulative remedy by way of creating a distinct personal liability against the railroad company itself, and independent of any lien feature, it may well be contended that such a subject is distinct from that mentioned in the title, and that it is not comprehended therein. In that event, the provisions with regard to the taking of the bond, and resulting liability for failure to take it, would have to be excluded from the operation of the statute. It must, however, be presumed that it was the legislative view that those provisions

may be effective without doing violence to the constitution, and it is our duty to adopt such a view if it can be discovered.

For convenience of reference we here set forth § 1 of the act in full:

"Every person performing labor upon or furnishing material to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, fence, machinery, railroad, street railway, wagon road, aqueduct to creat hydraulic power or any other structure, or who performs labor in any mine or mining claim or stone quarry, has a lien upon the same for the labor performed or materials furnished by each, respectively, whether performed or furnished at the instance of the owner of the property subject to the lien, or his agent; and every contractor, subcontractor, architect, builder or person having charge of the construction, alteration or repair of any property subject to the lien as aforesaid, shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this act: *Provided,* That whenever any railroad company shall contract with any person for the construction of its road, or any part thereof, such railroad company shall take from the person with whom such contract is made a good and sufficient bond, conditioned that such person shall pay all laborers, mechanics and material men, and persons who supply such contractors with provisions, all just dues to such persons or to any person to whom any part of such work is given, incurred in carrying on such work, which bond shall be filed by such railroad company in the office of the county auditor in each county in which any part of such work is situated. And if any such railroad company shall fail to take such bond, such railroad company shall be liable to the persons herein mentioned to the full extent of all such debts so contracted by such contractor."

It will be observed that, following the semi-colon after the word "agent," it is provided that "every contractor . . . shall be held to be the agent of the owner for the purposes of the establishment of the lien created by this act." So far the section is complete. It has provided for a lien, and has de-

clared who shall be agents for the purposes of the lien. Now follows what is designated as a proviso, wherein it is stated that when a railroad company shall contract with any person for the construction of its road, it shall take from such person a bond conditioned to pay laborers and materialmen. The bond is made security for what the prior portion of the section has said shall be lienable against the railroad property. We think the proviso was intended as an exception, and that the section after the semicolon should be liberally read to the effect that every contractor shall be held to be the agent of the owner for the purposes of the lien, except that, in the case of railroad companies, the contractor's bond for the security of laborers and materialmen shall dispense with such agency for the purposes of the lien, and shall take the place of the lien.

In other words, it seems to us clear that it was intended to relieve railroad property from the burden of the lien if a good and sufficient bond is provided for the security of the labor and material; but that, if such bond is not provided, then railroad property, like all other classes of property named in the act, must be subject to the establishment and enforcement of the lien. The failure to take the bond not only subjects the property to the lien, but the railroad company is also made personally liable in connection with the enforcement of the lien; so that a personal judgment may be had against it as an additional security, if the lien shall prove insufficient. Such a construction is urged by respondents, and we think it is entirely reasonable. It gives force to the whole section as pertaining to the enforcement of liens. We see no other way to construe it so as to give operative force to all provisions in the section and at the same time confine them to the subject of the enforcement of liens, which is the subject of the act. The effect of the construction is to say that, under specified conditions, liens shall be enforced against railroad and other property, but that railroad prop-

erty shall be excepted from the lien if a specified security is provided. Such a construction places no hardship upon laborers and materialmen. They have but to examine the records of the office of the county auditor of the county wherein the railroad is being constructed, in order to ascertain if a bond has been taken. If they find that there is no such bond, then they must know that their remedy by way of lien is complete, and that they must proceed accordingly.

It is a rule of construction that a proviso often constitutes an exception to the enacting words of the section. "Provisos and exceptions are similar; intended to restrain the enacting clause; to except something which would otherwise be within it, or in some manner to modify it." Sutherland, Stat. Constr., § 222. See, also, Black, Interpretation of Laws, 270. In *In the Matter of George B. Webb,* 24 How. Prac. 247, the court said:

"The office of a proviso is not to enlarge or extend the act or the section of which it is a part, but rather to put a limitation and a restraint upon the language which the lawmaker has employed."

So in the statute before us, the proviso should not be held to enlarge the enacting portion of the section so as to create an entirely independent and cumulative remedy which is not in any sense related to the enforcement of liens, of which subject the enacting part solely treats, but it constitutes an exception defining certain conditions, which shall not be subject to the operation of the enacting part.

Inasmuch, therefore, as the railroad company failed to take a bond, appellant's assignors had a clear and undisturbed right to enforce liens against the railroad, if they complied with § 5 of the act and filed lien notices. The complaint does not show that they did so. Appellant is therefore not in position now to enforce a lien, and the personal judgment which he seeks against respondents can be had only in connection with the enforcement of the lien as already stated.

We therefore think it was not error to sustain the demurrer, and the judgment is affirmed.

Mount, C. J., Fullerton, Root, Crow, and Dunbar, JJ., concur.

[No. 5737. Decided March 15, 1906.]

Klickitat Warehouse Company, *Appellant,* v. Klickitat County *et al., Respondents.*[1]

Taxation—Assessment—Personal Property—Lien—When Attaches. Under Laws 1903, p. 73, amending the revenue laws to make the lien for personal property taxes attach upon the assessment of the same, instead of in the following year, "assessment" must be construed to refer to the listing of the property by the county assessor, in order to remedy the evils evidently aimed at by the amendment, and the lien for taxes attaches immediately upon such listing.

Appeal from a judgment of the superior court for Klickitat county, Miller, J., entered December 20, 1904, upon findings in favor of the defendants, after a trial before the court without a jury, dismissing on the merits, an action to enjoin the collection of a tax. Affirmed.

W. B. Presby and *F. D. Chamberlain,* for appellant.

E. C. Ward, for respondents.

Crow, J.—This action was commenced by the Klickitat Warehouse Company, a corporation, appellant, to enjoin the respondents, Klickitat County and T. B. Montgomery, its treasurer, from selling two warehouses in said county, one at Goldendale and one at Centerville, Washington, for taxes on wheat assessed to Balfour-Guthrie & Co., of Portland, Oregon. The complaint alleged that the Northern Wharf & Warehouse Company, an Oregon corporation, built both of said warehouses in the year 1902, and on August 1, 1903,

[1]Reported in 84 Pac. 860.

sold them to appellant; that early in the year 1903 Klickitat county assessed both warehouses, and one hundred and sixty-five thousand bushels of wheat located therein, as the personal property of Balfour-Guthrie & Co.; that the total taxes on said wheat and warehouses was $2,509.96; that appellant tendered $133.20, the total tax on the warehouses, which respondents refused to accept, and that the respondents have advertised said two warehouses for sale to satisfy said entire sum of $2,509.96.

Respondents by their answer allege that said warehouses were the property of Balfour-Guthrie & Co. from the time of the listing of said warehouses and said wheat for taxation until August 1, 1903. Findings of fact were made in accordance with the respondents' contention, their substance in so far as they affect this opinion being that the Northern Wharf & Warehouse Company was not, at any of the times alleged in the complaint, the owner of said warehouses, but that said warehouses were built in the spring of 1902 by Balfour-Guthrie & Co., who continued to own the same until after the assessment of said warehouses and wheat contained therein; that the Northern Wharf & Warehouse Company performed certain acts in their construction as the agent of Balfour-Guthrie & Co.; that all acts of the Northern Wharf & Warehouse Company in the management of said warehouses, since the same were built, were also performed as agents of Balfour-Guthrie & Company, and that the treasurer of Klickitat county had, prior to the commencement of the action, advertised said warehouses for sale to satisfy the amount due for taxes thereon, and also on said wheat. Upon said findings, the court entered judgment in favor of respondents, from which judgment this appeal has been taken.

The first assignment of error is based upon the contention that the findings of fact made by the trial court were not sustained by the evidence. We have carefully examined the evidence, and are satisfied that the findings are fully warranted thereby, and will not disturb the same.

The principal assignment of error urged by appellant is based upon the contention that, under the law of this state, as it existed in 1903, the tax assessed against said wheat and warehouses, which were personal property, did not become a lien until after September 1, 1903. Prior to 1903, taxes assessed upon personal property became a lien upon all real and personal property of the person assessed from and after the first Monday of February next succeeding the date of their levy. Bal. Code, § 1740. On March 9, 1903, the legislature passed, with an emergency clause, an amendatory act (Laws 1903, p. 73), section 3 of which act provided that the taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the date upon which such *assessment* is made. As appellant acquired its warehouses on August 1, 1903, it now contends that such warehouses were not subject to any lien for taxes on said wheat for the year 1903, for the reason that, under said amendatory act, the assessment of personal property is not completed until the state board of equalization has fully discharged its duties; that said board does not meet until the first Tuesday in September (Bal. Code, § 1716), and hence no lien existed on the warehouses before they became the property of appellant. In support of this position appellant cites, *Hunt v. Fawcett*, 8 Wash. 396, 36 Pac. 318, where this court said:

"It appears from the pleadings that only such indebtedness as was incurred after the assessment of 1892 became operative was invalid, and it therefore becomes important to ascertain that date. It is claimed by the appellant that it was the 20th day of August, 1892, because upon that day the county board of equalization adjourned and the rolls were footed. But we are of the opinion that said assessment did not take effect until October 15, 1892. On that day the work of the state board of equalization was completed, and then, and not until then, did the value of the property in the county, for the purposes of state and county taxation, become fixed and certain."

In deciding when respondents' tax lien attached, it becomes necessary for us to construe § 3 of the act of 1903, and determine the meaning of the word "assessment" as there used. The ruling in *Hunt v. Fawcett* was undoubtedly correct, but in that case this court was passing upon the meaning of the word "assessment," as used in § 6, art. 8, of the constitution of this state, which fixes the method of arriving at the limit of municipal indebtedness. The word "assessment" may have different meanings according to its use. Welty, in his work on Assessments, at § 2, says:

"There is still another sense in which the word 'assessment' is used, and by which is meant an official listing of persons and property, with an estimate of the value of the property of each, for the purpose of taxation."

Respondents contend that the word "assessment," as used in § 3 of the act of 1903, refers to the act of the county assessor or his deputy in placing his valuation on personal property listed with him by the owner. We think this contention should be sustained. In construing this statute, we must inquire into the purpose sought to be accomplished by its enactment. It is common knowledge that, under the former statute, Bal. Code, § 1740, where personal property was listed in one year and a lien for taxes did not attach until the following February, large amounts of such property changed hands or were removed from the county after listing and before the lien attached, and the taxes could not be collected. The legislature evidently intended to remedy this evil by causing the lien to attach at an earlier date. To do this, it passed the act of 1903, adding the emergency clause with the evident intention of having liens attach immediately during the then current year. If appellant's contention is correct, and no lien attached until after September 1, 1903, the emergency clause was neither necessary nor of any value. The word "assessment," as frequently used in our revenue laws, undoubtedly refers to the act of the assessor in placing

his valuation on property listed with him. Bal. Code, § 1662, referring to migratory stock, reads as follows:

"When any cattle, horses, sheep or goats are driven into any county of this state for the purpose of grazing therein at any time after the first Monday in April in any year, they shall be liable to be assessed for all taxes leviable in that county for that year, the same as if they had been in the county at the time of the annual assessment, and it shall be the duty of the assessor in any county in which any of said stock are driven, to assess the same, and the taxes on said stock shall become due upon the assessment of the same, and the sheriff shall collect said taxes at once in the manner prescribed by law for the collection of delinquent taxes: *Provided,* That such stock has not been assessed in some other county in this state for that year."

The apparent purpose of this section was to enforce the collection of taxes upon stock before it could be driven out of the county, and the word "assessment," as used in the clause "and the taxes on said stock shall become due upon the assessment of the same," undoubtedly referred to the assessment made by the county assessor. To hold otherwise would cause the act to become a dead letter.

Again, in Bal. Code, § 1704, the word "assessment" is used as referring to the duties and acts of the assessor in listing property, placing his valuation thereon, and entering the same upon his assessment books. In § 1714 it is provided that the county commissioners, as a board of equalization, shall examine and compare the returns of the assessment of the property of the county, evidently referring to the assessment made by the county assessor.

Taking into consideration the manner in which this word has been repeatedly used in our revenue laws, and the purpose sought to be accomplished by § 3 of the act of 1903, we hold that, under said section, the lien for taxes on personal property attaches to the personal property and real estate of the person assessed immediately when such personal property is listed with the county assessor, and he has placed his

valuation thereon. As these acts were fully performed prior to August 1, 1903, the taxes became a lien on said warehouses before appellant acquired its title.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, ROOT, and DUNBAR, JJ., concur.

[No. 5823. Decided March 16, 1906.]

LOUISE TAYLOR, *Respondent*, v. MODERN WOODMEN OF AMERICA, *Appellant*.[1]

INSURANCE — BENEFIT CERTIFICATES — CONDITIONS PRECEDENT — PLEADING — GENERAL DENIAL. In an action upon a benefit certificate, in which the plaintiff alleges generally the performance of all conditions precedent, the defendant, in order to rely upon a breach of any such condition, must specifically plead the condition and breach, a general denial being insufficient for that purpose.

EVIDENCE — WRITTEN ANSWERS OF DECEASED — BEST AND SECONDARY. In an action upon a benefit certificate, the written answers of the deceased, as contained in the physician's report, is the best evidence of his disclosures to the physician, and it is not error to exclude the physician's evidence as to such disclosures.

SAME — CAUSE OF DISEASE — MATERIALITY. In an action upon a benefit certificate, evidence as to what cause the deceased had attributed a disease is immaterial.

SAME — OPINION EVIDENCE — NON-EXPERTS. In an action upon a benefit certificate, it is proper to exclude the opinion of a non-expert witness as to conduct of the deceased indicating that he had a certain disease.

APPEAL — REVIEW — HARMLESS ERROR. Excluding evidence as to whether the deceased had complained of weakness is not prejudicial where the witness had testified to an instance of that character.

EVIDENCE — MEDICAL EXPERTS — COMPETENCY. A medical expert is shown to be competent to give an opinion as to whether a cancer was of recent growth, where it appears that he graduated in medicine twenty years ago, had practiced ever since, taken post graduate courses, assisted in performing the operation upon the deceased, and saw and examined the cancer.

[1]Reported in 84 Pac. 867.

APPEAL—RECORD—AFFIDAVITS. Affidavits used upon a motion for a new trial cannot be considered on appeal when not embodied in a statement of facts.

APPEAL—REVIEW—EXCEPTIONS—TRIAL—IMPROPER STATEMENTS OF ATTORNEY. A mere exception to improper statements of counsel to the jury, without moving the court in the matter, is insufficient to secure a review of error assigned thereon.

SAME—HARMLESS ERROR. Error assigned upon the misstatement of the evidence by counsel, in argument to the jury, is cured where the court immediately upon exceptions taken instructs the jury to disregard the same.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered July 22, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action upon a benefit certificate. Affirmed.

Emery, Rourke & Denney (Ben. D. Smith, of counsel), for appellant.

Newman & Howard, for respondent.

HADLEY, J.—This is an action to recover upon a fraternal beneficiary certificate. Plaintiff is the widow of the insured, and is the beneficiary named in the certificate. A trial was had before a jury, and a verdict was returned in favor of the plaintiff. The defendant moved for a new trial, and the motion having been denied, judgment was entered by the court in accordance with the verdict. The defendant has appealed.

It is assigned that the court erred in denying appellant's motion for nonsuit at the close of respondent's case in chief. To make clear what is involved in this assignment, it is necessary that we shall examine the condition of the issue as submitted by the pleadings. The complaint alleges that the deceased kept and performed all the terms and conditions required by the benefit certificate. All other material averments of the complaint are expressly admitted by the answer. There is a general paragraph in the answer as follows:

"Defendant, further answering, denies each and every allegation and averment contained in the said complaint of the plaintiff, except as herein expressly admitted, qualified, or explained." Affirmative averments then follow, whereby certain facts are alleged as to the by-laws of the appellant and the application for membership by the deceased. These are followed by averments which are specifically designated as the "affirmative ground of defense," and by which it is alleged that the application for membership contained certain questions which were answered therein by the deceased and by him warranted to be true; that the following question was asked: "Are you now of sound body, mind and health, and free from disease or injury?" and that it was answered, "Yes." It is alleged that the answer was false in that the applicant had at that time the disease known as "piles," and that he also had cancer; that the following question was also asked: "Have you ever had any disease of the following named organs, or any of the following named diseases or symptoms: Cancer; piles?" and that the same was answered, "No." It is alleged that the answer was false in that the applicant had at that time, and prior thereto, the disease of cancer of the rectum, and also the disease known as piles.

It will be observed that the allegations are that the applicant was so afflicted at the time he answered the questions. The truth of the answers became a condition precedent to the validity of the contract of insurance, and the written evidence offered in chief, which contained the application of the insured, supported the truth thereof for the purposes of submitting to the jury. But appellant urges the following statement in the application as a further condition precedent: "Any certificate which shall be issued to me in pursuance of this application shall be delivered to me after adoption and while in sound health and in pursuance of the by-laws of the society." The certificate was not delivered until some time after the application was made, and appel-

lant contends that it was incumbent upon respondent to show by proof at the trial that the above as a condition precedent was performed, and that the applicant was in sound health at the time the certificate was delivered. Respondent's position is that, under the issues as presented by the pleadings, that burden was not placed upon her. She alleged generally the performance of all conditions, such being strictly permissible under Bal. Code, § 4934. The section also provides that, when such allegations are controverted, the party pleading them shall be bound to establish on the trial the facts showing such performance. She contends that the performance of the condition relative to the state of health at the time of delivery of the certificate was not controverted by the answer within the meaning of the code. If it was not controverted, then under Bal. Code, § 4943, it shall be taken as true.

It is certain that the affirmative matter of the answer does not controvert that allegation since, as we have seen above, it is referable only to the time when the application was signed and prior thereto. If it is controverted so as to put the question in issue, then it must be because of the denial which we have quoted above. That denial, it will be observed, is limited to what is not expressly "admitted, qualified or explained." Just what the pleader means to comprehend by the term "qualified or explained" is indefinite and not clear, and the reader is left in doubt as to just what is denied. If, however, it were construed as amounting to a general denial, we think it would be insufficient to raise an issue as to a breach of a condition precedent under a well-recognized rule upon this particular subject, as held by eminent authorities. That rule is that, when a plaintiff has alleged the performance of conditions precedent, the defendant who desires to rely upon a breach of any such conditions, must specifically point out in his pleading the condition and breach upon which he relies, the general denial being insufficient for

that purpose. Mr. Bliss, in his work on Code Pleading (3d ed.), § 356a, says upon this subject:

"The Codes provide, as we have seen, that in counting upon a contract with conditions precedent, their performance may be stated generally. How then may an intelligent issue be made in respect to such performance? May the defendant say that they have not been performed? May he deny generally the plaintiff's statement and thus put him upon proof of performance as to each condition? Or should he state specifically the breach upon which he relies? Upon principle and analogy the defendant should be required to point out the specific condition and show its breach. He relies upon this breach as an excuse for violating the contract on his part; the demand for certainty in pleading, the general object of written pleadings, requires that he point it out and this is analogous to the common-law practice just spoken of."

In the case of *Kahnweiler v. Phenix Ins. Co.*, 67 Fed. 483, the court said:

"By failing to set up the condition precedent and its breach in its answer, the defendant waived that defense. If the rule were otherwise, a degree of uncertainty would be introduced in the practice in this class of cases much greater even than that which obtained under the general issue at common law. It would be a snare and a pitfall, and neither the plaintiff nor the court would have any knowledge of the issue to be tried. No matter how many conditions precedent the contract contained, the plaintiff would be obliged to go to the expense of preparing to prove performance or waiver of every one of them. An objection of this character cannot be held back, as was done in this case, until, at great expense, a trial has been gone through with, and the plaintiffs have closed their case upon the evidence, and then be brought forward for the first time by way of a demurrer to the evidence. Such a practice would be intolerable."

See, also, *Preston v. Roberts*, 12 Bush 570; *Chambers v. Northwestern etc. Ins. Co.*, 64 Minn. 495, 67 N. W. 367, 58 Am. St. 549; *Benjamin v. Connecticut Indemnity Ass'n*, 44 La. Ann. 1017, 32 Am. St. 362; *Reed v. Hayt*, 109 N. Y. 659, 17 N. E. 418; *Phoenix Assur. Co. v. Deavenport*, 16

Tex. Civ. App. 283, 41 S. W. 399; *Liverpool etc. Ins. Co. v. Hall,* 1 Kan. App. 18, 41 Pac. 65; *Helvetia etc. Ins. Co. v. Edward P. Allis Co.,* 11 Colo. App. 264, 53 Pac. 242; *Moody v. Amazon Ins. Co.,* 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. 699. We therefore think that the question of a breach of the condition that the insured should have been in sound health at the time of the delivery of the certificate was not within the issues tendered by the answer, and there was no duty resting upon respondent to make proof upon that subject. It was not error to deny the nonsuit.

The above is the most important question raised in the case. We shall now, however, refer to a number of errors assigned upon the introduction of testimony. (a) Objection was sustained to the following question, which was put to the physician who examined the insured at the time his application was filled out: "Did the deceased at that time make known to you the existence then or prior thereto of either the diseases of piles or cancer of the rectum, or any symptoms thereof, or either?" The objection was sustained on the ground that the examination was, at the time it was made, reduced to writing, and that it was already before the jury. The examination showed upon its face that the insured answered the physician that he never had the diseases mentioned, and it is obvious that the witness must have answered the question in the negative, if at all. The writing itself was the best evidence of the disclosures made at that time. (b) Objection was sustained to the following question, which was put to another witness: "Do you recall giving him the information that during the summer Mr. Taylor had complained of piles and laid it to bicycle riding?" The witness had said that some time during the summer of 1901 the deceased stated that he thought he had piles, but that he had not attributed the disease to any particular cause. The question sought to have the witness further say that the witness had said to another person that deceased attributed the cause to bicycle riding. We think it was immaterial what may

have been the cause, the real inquiry being whether the disease in fact existed. (c) Objection was sustained to the following question: "Did you see any conduct or action on the part of Mr. Taylor that would indicate to you that he had piles? If so, what was it?" The witness so interrogated was not a medical expert, and the question called for an opinion which only an expert was competent to give. He might have been asked as to facts he did observe, leaving the conclusion to be drawn by the jury. But the question was not so framed and was objectionable. Objection to another similar question asked of the same witness was also properly sustained. (d) Objection was sustained to the following question: "Did Mr. Taylor make any complaint to you during the summer of 1901 as to his strength or weakness? If so, what was it?" This witness did, however, state that the deceased asked him to turn over some bolt sleds because he said he was not strong enough to do it alone. In view of this, we think it should not be held that the sustaining of the objection to the above question was prejudicial to the extent of calling for reversal. (e) Respondent asked a medical witness the following question: "Now I will ask you, doctor, to state whether or not in your judgment that cancer was of recent growth?" Appellant objected that no proper foundation had been laid, and the objection was overruled. We think sufficient foundation had appeared in the witness' previous testimony. He testified that he took the specified medical training that was in vogue more than twenty years ago, and graduated therein; that he has followed the occupation of physician and surgeon for more than twenty years, and meanwhile has taken several post-graduate courses; that he assisted in performing a surgical operation upon the deceased Taylor for cancer of the rectum, and saw and examined the cancer. It would seem that no further qualification of an ordinary medical witness was required. It was the privilege of appellant to examine the witness as to his specific qualifications and experience concerning the treatment of cancer, and such

a course was pursued. One other error is urged in connection with this witness' testimony, but we think the exclusion of the question asked was not prejudicial, for the reason that it was hypothetical in form and included some facts not in evidence.

The assignment that the court erred in refusing to direct a verdict for appellant has already been sufficiently covered by what has been said. The assignments with regard to the giving and refusal of instructions arise chiefly from the views of appellant's counsel as to what was contained in the issues. We think the instructions given fairly stated the law conformably to the issues as viewed by the court, and that view we have sustained by what we have hereinbefore said. We believe no useful purpose will now be served by specifically discussing the points raised on the instructions.

Under the motion for new trial, misconduct of respondent's counsel is urged. In this connection we are asked to consider an affidavit of appellant's counsel, but it is not embodied in any statement of facts certified by the court, and under repeated decisions of this court it cannot for that reason be considered. It is only by means of such a certificate that this court can be properly advised that such an affidavit was called to the attention of the trial court and considered by it.

Reference to the statement of facts, however, discloses the following in connection with the alleged misconduct of counsel. After the arguments to the jury had been closed, appellant's counsel made the following statement: "I desire to except to the statement of counsel that Mrs. Taylor had no knowledge material to the case, as being a statement of fact which the counsel is not justified from the record or otherwise in making, and one likely to prejudice the jury." Thereupon respondent's counsel made an explanatory statement, to the effect that he was simply replying to a statement of appellant's counsel that, if Mrs. Taylor had testified, she would have supported certain facts. Whatever merit there may have been in appellant's point, the court was not moved to act in

the matter. A mere exception to counsel's statement was announced. This is insufficient for review in this court. *State v. Regan,* 8 Wash. 506, 36 Pac. 472; *State v. Bailey,* 31 Wash. 89, 71 Pac. 715; *State v. Van Waters,* 36 Wash. 358, 78 Pac. 897. In any event, however, we think the court fully cured any error in this connection when, immediately after the occurrence shown above, it of its own motion instructed the jury as follows:

"Gentlemen of the jury. I instruct you now to disregard the statements of counsel for the defendant and counsel for the plaintiff, in so far as the statements are not borne out by the testimony that has been offered and admitted by the court. The statements of counsel, either in argument to the jury or in any objections made to the court or in exceptions taken to any ruling of the court or exceptions taken to any statement of counsel upon either side, are not to be considered by you as evidence in the case, but you must determine this case entirely upon the testimony which has been admitted by the court before you."

It is also urged under the motion for new trial that the verdict was not justified by the evidence. We think there was ample evidence within the issues for the consideration of the jury. By the verdict the jury must have found that the condition precedent as to the state of deceased's health at the time of his application for membership was not violated. That being the only issue before them, we shall not disturb the verdict.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5992. Decided March 16, 1906.]

A. BAUER, *Respondent*, v. J. J. HAGGERTY *et al.*, *Appellants*.[1]

RECEIVERS—APPOINTMENT—TRUSTS—UNFAITHFULNESS OF TRUSTEE—SOLVENCY OF DEFENDANT. Where the stock in trade of a corporation, which is to cease as a going concern, is sold to one of the two stockholders, who agreed to collect the outstanding accounts, deposit the proceeds in bank and make weekly statements to the other stockholder, the proceeds to be divided equally after paying a balance due from the purchaser, such purchaser is a trustee, and not a partner as to such collections, and upon unfaithfulness to the trust by making false statements of collections made and refusing to account, the court is justified in appointing a receiver to take charge of the collections, when the books and information are in the exclusive possession of the trustee; and it is immaterial that the trustee is solvent or offers to give bond for the performance of any judgment.

Appeal from an order of the superior court for King county, Frater, J., entered August 5, 1905, appointing a receiver to collect the accounts of a corporation, upon application of the plaintiff in an action for an accounting. Affirmed.

McCafferty & Bell, for appellants.

Richard Saxe Jones and *Harold Preston*, for respondent.

MOUNT, C. J.—This appeal is from an order of the superior court of King county, appointing a receiver to collect the accounts of J. J. Haggerty & Company, a corporation, and temporarily enjoining the appellants from collecting any of the outstanding accounts due to said corporation. The order was granted after a hearing upon a show-cause order. It appears that J. J. Haggerty & Co. is a corporation organized under the laws of this state, and prior to the 28th day of March, 1905, was engaged in business in the city of Seattle as a wholesale liquor dealer. All the stock of the corporation was owned equally by appellant J. J. Haggerty, who was a resident of the city of Seattle, and the respondent, who was a

[1]Reported in 84 Pac. 871.

resident of the city of Chicago, Illinois. One share of the respondent's stock stood in the name of George W. Simon, who was secretary of the corporation. Appellant J. J. Haggerty was the president, and had the sole control and active management of the business of the corporation. Appellant Haggerty, respondent Bauer, and Mr. Simon constituted the board of directors.

About the date above named, it was agreed by the stockholders to pay all the debts, dispose of all the assets, collect all the accounts, and distribute the proceeds, and close the business of the corporation as a going concern. Meetings of the stockholders were held, and resolutions were passed to that effect, and authorizing the procedure above indicated. All three of the stockholders were present and agreed thereto. Upon a report of the appellant J. J. Haggerty, a written agreement was entered into by which it was agreed that the stock of goods on hand amounted to $12,730.82; that the cash on hand was $2,782.12; that the outstanding accounts amounted to $25,399.50; and that the liabilities amounted to $2,782.12, being the same amount as the cash on hand. It was also agreed that respondent had drawn from said corporation $11,766.76; and that J. J. Haggerty had drawn from said corporation $4,095.86. It was further agreed that the stock of goods on hands should be sold and delivered to the said J. J. Haggerty for the sum of $12,730.82, making a total that Mr. Haggerty received of $16,826.68, or $5,059.92 in excess of the amount which respondent had received. It was further agreed that Mr. Haggerty should collect the outstanding accounts, and from the first money collected should pay to respondent $5,059.92, and thereafter the balance should be deposited in a bank named, to the credit of the corporation, and divided equally between respondent and appellant J. J. Haggerty. It was further agreed that appellant Haggerty should have charge of all the accounts and collect the accounts within the city of Seattle without compensation, and outside accounts should be turned over to collectors and

a commission of eight per cent allowed for such collections. It was further agreed that Mr. Haggerty should make weekly statements to respondent of the amounts collected.

Under this agreement the stock of goods was delivered to appellant J. J. Haggerty, the books and accounts were turned over to him to be collected, and respondent returned to his home in Chicago. Thereafter Mr. Haggerty made no statement to respondent as agreed upon, but on July 3, 1905, at the request of respondent, he rendered an itemized statement of money received, which statement showed that up to that time appellant J. J. Haggerty had collected $5,739.81, but that the costs of collection amounted to $3,623.34. On that day Mr. Haggerty paid to respondent the sum of $5,059.92, and respondent thereupon turned over to Mr. Haggerty his certificate for stock in the corporation. On July 29, 1905, respondent demanded of Mr. Haggerty a further accounting of collections made, when Mr. Haggerty refused to make any further accounting, claiming to be the owner of all the stock in the corporation; and that it was agreed on July 3, when the payment of $5,059.92 was made to respondent, that respondent in consideration of said payment should have no further interest in the accounts or the corporation.

It appears further that the accounts of the corporation are numerous; that the books are wholly under the control of appellant Haggerty; that the creditors are widely scattered over this state and Alaska; and that the statement rendered to respondent on July 3, 1905, was not a true account of the moneys collected to that time, but that appellant Haggerty had received large amounts from several different debtors, which were not stated in the account; and that he concealed from respondent the true state of his collections. On these facts the receiver was appointed, and the restraining order issued as stated above. Prior to the time the order was made, the appellant J. J. Haggerty offered to enter into a bond in such sum and upon such conditions as the court

should order, to account for all collections from the accounts of the corporation.

There is no dispute in the record before us upon any of the facts above stated, except that respondent denied that he had no further interest in the accounts of the corporation, and appellant Haggerty denied the statement that he did not make a true account of moneys collected to July 3, 1905, or that he undertook to mislead or deceive respondent. Upon the showing made, the trial court evidently found that appellant Haggerty did not make a true account, and did undertake to mislead and deceive respondent, which finding is justified by the record. Appellants contend that the court erred in appointing a receiver, for two reasons, (1) that it was not shown that appellant J. J. Haggerty was insolvent, and (2) because the bond offered by appellant would have afforded all necessary security until final determination of the cause. Both of these reasons are the same. One is no more potent than the other. If appellant J. J. Haggerty is solvent, any judgment recovered against him may be satisfied. The bond could do no more and is only for the purpose of rendering the judgment certain. If the insolvency of the appellant Haggerty was the only ground for the appointment of a receiver in this case, or if his solvency may be considered as affording an adequate remedy to respondent, it is clear that the court was not authorized to appoint a receiver. But this is not the ground upon which the appointment was made, because it is apparently conceded that the appellant J. J. Haggerty is entirely solvent. The respondent maintained in the court below, and insists here, that he and appellant Haggerty are jointly interested in these accounts, and that Mr. Haggerty was a trustee for the purpose of collecting them and placing the proceeds in a certain bank for their joint benefit; that he has exclusive control of the books; that the persons owing the accounts are widely scattered over this state and Alaska; that respondent does not know the debtors and has no means of determining who or where they are, or the items of their accounts, or the

different amounts owing, and he has no means of acquiring this information; that it is all within the hands of appellant J. J. Haggerty, who has made false representations regarding collections and refused to account, and is therefore a faithless trustee. These are sufficient grounds for the appointment of a receiver, even if the trustee is solvent. *Clay v. Selah Valley Irr. Co.,* 14 Wash. 543, 45 Pac. 141. It is clear from the record before us that appellant J. J. Haggerty is a trustee of these accounts, and of the proceeds of the collections, and that he should be so treated.

For the reason that the court was justified in finding that appellant J. J. Hagegrty has been recreant to his trust, and that it lies within his power to prevent the respondent from obtaining the facts showing the true condition of the accounts, and to prevent an honest accounting, it was not error for the court to appoint a receiver.

The order appealed from is therefore affirmed.

CROW, ROOT, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5993. Decided March 16, 1906.]

BENJAMIN BANK, *Respondent,* v. EARLE DOHERTY *et al., Appellants.*[1]

USURY—NOTE OF ANOTHER STATE—MORTGAGE SECURITY IN THIS STATE. A note and mortgage executed and made payable in another state by *bona fide* residents of such state, is a contract of such state and is not usurious if valid in such state.

CONTRACTS — NOTE EXECUTED IN ANOTHER STATE — VALIDITY — USURY. The fact that a binding contract between citizens of another state, valid by the laws of such state, is secured by a mortgage upon real property in this state, does not render the contract subject to the usury laws of this state, or prevent the enforcement of the same here, on the theory that the usury law affects only the remedy.

APPEAL—REVIEW—EXCEPTIONS—SUFFICIENCY. An exception to a finding of the amount of interest due on a note, as unsupported by

[1]Reported in 84 Pac. 872.

any contrary to the evidence, is sufficient to raise the point that, under the laws of the state where made, which were put in evidence, the interest should have been computed at a different rate after maturity.

INTEREST—NOTE OF ANOTHER STATE—FOREIGN LAWS—CONSTRUCTION. Where a promissory note called for interest at two per cent per month, without specifying any rate after maturity, and the laws of the state where made expressly provide that in such case interest after maturity shall be at the rate of eight per cent per annum, there is no presumption that the parties intended it to run at two per cent per month, and only eight per cent per annum after maturity can be collected.

MORTGAGES—PRIORITY—OWNERSHIP OF PRIOR MORTGAGE—NOTICE. A second mortgagee, who advances the money to pay off a prior mortgage in the hands of one not the owner thereof, pending an appeal by the true owner, in litigation respecting his title to such first mortgage, with actual notice of the rights of the true owner and knowledge of the whole transaction, is not entitled to priority over the true owner upon terminaion of such litigation.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 20, 1905, upon findings in favor of the plaintiff after a trial before the court without a jury, in an action to foreclose a mortgage. Modified.

Melville C. Brown, John W. Roberts and *Maurice D. Leehey,* for appellants Doherty *et al.* The defense of usury affects only the remedy, and is governed by the *lex fori. Emery v. Burbank,* 163 Mass. 326, 39 N. E. 1026, 47 Am. St. 456, 28 L. R. A. 57; *Irving v. Ford,* 183 Mass. 448, 67 N. E. 366, 97 Am. St. 447, 65 L. R. A. 177; *Ridgway v. Davenport,* 37 Wash. 134, 79 Pac. 606; *La Selle v. Woolery,* 14 Wash. 70, 44 Pac. 115, 53 Am. St. 855, 32 L. R. A. 73; *Clark v. Eltinge,* 38 Wash. 376, 80 Pac. 556, 107 Am. St. 757; *Craig v. Butler,* 9 Mich. 21; *Thurston v. Prentiss,* 1 Mich. 193; *Sherman v. Gassett,* 9 Ill. 521; *Suffolk Bank v. Kidder,* 12 Vt. 464, 36 Am. Dec. 354; *Collins Iron Co. v. Burkham,* 10 Mich. 283; *Watriss v. Pierce,* 32 N. H. 560; *Wright v. Bartlett,* 43 N. H. 548; *Willis v. Cameron,* 12 Abb. Pr. 245; *Gale v. Eastman,* 7 Met. (Mass.) 14; Story,

Conflict of Laws, § 572; *Gibbs v. Howard,* 2 N. H. 296; *Falls v. United Sav. etc. Co.,* 97 Ala. 417, 13 South. 25, 38 Am. St. 194, 24 L. R. A. 174; *Meares v. Finlayson,* 55 S. C. 105, 32 S. E. 986; *Carpenter v. Lewis,* 60 S. C. 23, 38 S. E. 244; *Turpin v. Povall,* 8 Leigh (Va.) 93; *Sime v. Norris,* 8 Phila. 84. In any event, interest should have been computed at the contract rate to the date of maturity only. *Palmer v. Laberee,* 23 Wash. 409, 63 Pac. 216; *Holden v. Trust Co.,* 100 U. S. 72, 25 L. Ed. 567. The *lex loci contractus* is enforced only as a matter of comity, when in accordance with our own notions of propriety and policy. Minor, Conflict of Laws, p. 8; *Blackington v. Blackington,* 141 Mass. 432, 5 N. E. 830, 55 Am. Rep. 484; *In re Ellis' Estate,* 55 Minn. 401, 56 N. W. 1056, 43 Am. St. 514, 23 L. R. A. 287; *Roth v. Roth,* 104 Ill. 35, 44 Am. Rep. 81; *Cook v. Cook,* 56 Wis. 195, 14 N. W. 33, 43 Am. Rep. 706; *Green v. Van Buskirk,* 5 Wall. 307, 18 L. Ed. 599; *Id.,* 7 Wall. 139, 19 L. Ed. 109; *Hervey v. Rhode Island Locomotive Works,* 93 U. S. 664, 23 L. Ed. 1003; *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565; *Atherton Co. v. Ives,* 20 Fed. 894; *Moore v. Land, Title & Trust Co.,* 82 Md. 288, 33 Atl. 641; *Petersen v. Chemical Bank,* 32 N. Y. 21, 88 Am. Dec. 298. It will not be enforced if it contravenes the statute law or established law of the forum. *May v. First Nat. Bank,* 122 Ill. 551, 13 N. E. 806; *Frank v. Bobbitt* 155 Mass. 112, 29 N. E. 209; *Mackey v. Pettijohn,* 6 Kan. App. 57, 49 Pac. 636; *Bowles v. Field,* 78 Fed. 742; *Case v. Dodge,* 18 R. I. 661, 29 Atl. 785; *Despard v. Churchill,* 53 N. Y. 192; *Van Voorhis v. Brintnall,* 86 N. Y. 18, 40 Am. Rep. 505; *Freeman's Appeal,* 68 Conn. 533, 37 Atl. 420, 57 Am. St. 112, 37 L. R. A. 452; *Armstrong v. Best,* 112 N. C. 59, 17 S. E. 14, 34 Am. St. 473, 25 L. R. A. 188; *Commonwealth v. Lane,* 113 Mass. 458, 18 Am. Rep. 509; *True v. Ranney,* 21 N. H. 52, 53 Am. Dec. 164; *Jackson v. Jackson,* 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; *Pennegar v. State,* 87 Tenn. 244, 10

S. W. 305, 10 Am. St. 648, 2 L. R. A. 703; *State v. Ross,* 76 N. C. 242, 22 Am. Rep. 678; *Edgerly v. Bush,* 81 N. Y. 199; *Woodward v. Brooks,* 128 Ill. 222, 20 N. E. 685, 15 Am. St. 104, 3 L. R. A. 702; *Ex parte Dickinson,* 29 S. C. 453, 7 S. E. 593, 13 Am. St. 749; *Smith v. Union Bank,* 5 Pet. 518, 24 L. Ed. 212; *Williams v. Kemper etc. Dry Goods Co.,* 4 Okl. 145, 43 Pac. 1148; *Barnett v. Kinney,* 147 U. S. 476, 13 Sup. Ct. 403, 37 L. Ed. 247; *Butler v. Wendell,* 57 Mich. 62, 23 N. W. 460, 58 Am. Rep. 329; *Kerr v. Dougherty,* 79 N. Y. 327; Minor, Conflict of Laws, p. 11. Legislation subsequent to the transaction in dispute may be looked to to determine the state policy. *Milliken v. Pratt,* 125 Mass. 374, 28 Am. Rep. 241; *Case v. Dodge,* 18 R. I. 661, 29 Atl. 785; *Fellows v. Miner,* 119 Mass. 541; *Dammert v. Osborn,* 140 N. Y. 30, 35 N. E. 407. The privilege of the *lex fori* should be confined to citizens of the forum. 1 Wharton, Conflict of Laws, p. 10; *Sullivan v. German Nat. Bank,* 18 Colo. App. 99, 70 Pac. 162; *Donovan v. Pitcher,* 53 Ala. 411, 25 Am. Rep. 634; *Benton v. Singleton,* 114 Ga. 548, 40 S. E. 811, 58 L. R. A. 181; *Pope v. Hanke,* 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; *Commonwealth v. Bassford* 6 Hill 526; *Bartlett v. Collins,* 109 Wis. 477, 85 N. W. 703, 83 Am. St. 928. If the mortgage is merely a collateral security, the money to be loaned primarily on the debtor's personal credit, then the law of the place of payment will control. If the money was loaned to be employed on the land for which the mortgage was given, then the law of the place where the mortgaged property is situated must prevail. *Fitch v. Remer,* Fed. Cas. No. 4,836; *Chapman v. Robertson,* 6 Paige 627, 31 Am. Dec. 264; *Goddard v. Sawyer,* 9 Allen 78; *Pine v. Smith,* 11 Gray 38; *Philadelphia Loan Co. v. Towner,* 13 Conn. 249; *Levy v. Levy,* 78 Pa. St. 507, 21 Am. Rep. 35; *Kilgore v. Dempsey,* 25 Ohio St. 413, 18 Am. Rep. 306; *Fisher v. Otis,* 3 Chand. (Wis.) 83; *Arnold v. Potter,* 22 Iowa 194.

Elmer E. Todd, for appellant Dutton, contended, *inter alia,* that no legal grounds were stated for vacating the sheriff's sale. Pierce's Code, § 876; *Whitworth v. McKee,* 32 Wash. 83, 72 Pac. 1046; 21 Century Digest, 1326, and authorities cited. An innocent purchaser, without notice, from one who bought at a fraudulent sheriff's sale, will take good title. *Blight's Heirs v. Tobin,* 23 Ky. 612, 18 Am. Dec. 219; *Cowles v. Hardin,* 101 N. C. 388, 7 S. E. 896, 9 Am. St. 36; 25 Am. & Eng. Ency. Law (2d ed.), pp. 803, 804; *Ceburre v. Pearson* 50 N. Y. Supp. 112; *Lavender v. Holmes,* 23 Neb. 345, 36 N. W. 516; *Richey v. Merritt,* 108 Ind. 347, 9 N. E. 368. He is not bound to inquire beyond the record. *Reeve v. Kennedy,* 43 Cal. 643. A sheriff's sale cannot be set aside on motion without notice to the purchaser. *Eckstein v. Calderwood,* 34 Cal. 658; *Osborn v. Cloud,* 23 Iowa 104, 92 Am. Dec. 413; *Harrell v. Word,* 54 Ga. 649; *Clamorgan v. O'Fallon,* 10 Mo. 112; Freeman, Executions (2d ed.), 306. Possession of the note is presumptive evidence of its transfer. *Fischer v. Woodruff,* 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742. Bank is estopped to claim his mortgage as prior to Dutton's. Jones, Mortgages (5th ed.), § 967; *Heyder v. Excelsior etc. Loan Ass'n,* 42 N. J. Eq. 403, 8 Atl. 310, 59 Am. Rep. 49; *City Council v. Ryan,* 22 S. C. 339, 53 Am. Rep. 713; *Robbins v. Todman,* 28 Kan. 491.

James B. Murphy, Harold Preston, and *Graves, Palmer, Brown & Murphy,* for respondent, contended, among other things, that the fact that the indebtedness was secured by the mortgage upon real property in the state of Washington, does not make it subject to the Washington laws relating to usury. *Odom v. New England Mortgage Security Co.,* 91 Ga. 505, 18 S. E. 131; *Cotheal v. Blydenburg,* 5 N. J. Eq. 17; *Chase v. Dow,* 47 N. H. 405; *Dolman v. Cook,* 14 N. J. Eq. 56; *Andrews v. Torrey,* 14 N. J. Eq. 355; *Lewis v. Headley,* 36 Ill. 433, 87 Am. Dec. 227; *Hickox v. Elliott,* 22 Fed. 13;

Call v. Palmer, 116 U. S. 98, 6 Sup. Ct. 301, 29 L. Ed. 559; *Fitch v. Remer,* Fed. Cas. No. 4,836; *Black v. Reno,* 59 Fed. 917; *Broughton's Adm'r v. Bradley,* 36 Ala. 689; *Eastwood v. Kennedy,* 44 Md. 563; *Coghlan v. South Carolina R. Co.,* 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951; *Bigelow v. Burnham,* 83 Iowa 120, 49 N. W. 104; *Oregon etc. Trust Inv. Co. v. Rathburn,* Fed. Cas. No. 10,554; *Bedford v. Eastern etc. Loan Ass'n,* 181 U. S. 227, 21 Sup. Ct. 597, 45 L. Ed. 834; *La Selle v. Woolery,* 14 Wash. 70, 44 Pac. 115, 53 Am. St. 855, 32 L. R. A. 73; *Clark v. Eltinge,* 38 Wash. 376, 80 Pac. 556; *De Wolfe v. Johnson,* 10 Wheat. 367, 6 L. Ed. 438; 2 Rose's Notes, 426, and cases cited; *United States etc. Loan Co. v. Beckley,* 137 Ala. 119, 33 South. 934, 97 Am. St. 19, 62 L. R. A. 33 and note. Interest is of the substance of the contract to be determined by *lex loci contractus. Union etc. Trust Co. v. Gelbach,* 8 Wash. 497, 36 Pac. 467, 24 L. R. A. 359; *State ex rel. Theis v. Bowen,* 11 Wash. 432, 39 Pac. 648; *State ex rel. Capital Nat. Bank v. Young,* 22 Wash. 547, 61 Pac. 725. Our usury laws are not applicable. *Swinburne v. Mills,* 17 Wash. 611, 50 Pac. 489, 61 Am. St. 932; *Warnock v. Itawis,* 38 Wash. 144, 80 Pac. 297; *Johnson v. Pullman State Bank,* 40 Wash. 64, 82 Pac. 122. There being no evidence to show a contrary intention, the law will presume that it was the intention of the parties that the money should bear the rate specified in the note, from its making until paid, or until such time as a judgment might be entered thereon. *Shaw v. Rigby,* 84 Ind. 375, 43 Am. Rep. 96; *Kellogg v. Lavender,* 15 Neb. 256, 48 Am. Rep. 339; *Overton v. Bolton,* 9 Heisk. 762, 24 Am. Rep. 367; *Kohler v. Smith,* 2 Cal. 597, 56 Am. Dec. 369; *Cox v. Smith,* 1 Nev. 161, 90 Am. Dec. 476; *McLane v. Abrams,* 2 Nev. 199; *Cecil v. Hicks,* 29 Gratt. 1, 26 Am. Rep. 391; *Union Institute v. Boston,* 129 Mass. 82, 37 Am. Rep. 305; *Findlay v. Hall,* 12 Ohio St. 610; *Thompson v. Pickel,* 20 Iowa 490; *Hand v. Armstrong,* 18 Iowa 324; *Adams v. Way,* 33 Conn. 419; *Hubbard v. Callahan,* 42 Conn. 524, 19

Am. Rep. 564; *Spencer v. Maxfield,* 16 Wis. 178; *Pruyn v. Milwaukee,* 18 Wis. 367; *Mayor etc. v. O'Callaghan,* 41 N. J. L. 349; *Jones Co. v. Guttenberg,* 66 N. J. L. 659, 51 Atl. 274; *Borders v. Barber,* 81 Mo. 636; *Weems v. Ventress,* 14 La. Ann. 267; *Warner v. Juif,* 38 Mich. 662; *Meaders v. Gray,* 60 Miss. 400, 45 Am. Rep. 414; *Cornwell v. Sac County,* 96 U. S. 57, 24 L. Ed. 686; *Ohio v. Frank,* 103 U. S. 698, 26 L. Ed. 531; *Wadesboro Cotton Mills Co. v. Barnes,* 114 N. C. 353, 19 S. E. 238; *Shipman v. Bailey,* 20 W. Va. 140; *Greenhaw v. Holmes* (Ariz.), 68 Pac. 537; *Kelley v. Phoenix Nat. Bank,* 17 App. Div. 496, 45 N. Y. Supp. 533.

MOUNT, C. J.—This is an action to foreclose certain real estate mortgages. On January 3, 1900, the respondent, Benjamin Bank, a resident of Butte, Montana, loaned to Mary T. Doherty, a resident of the same place, $2,500 on her promissory note, as follows:

"2,500.00. Butte, Montana, January 3, 1900.

"For value received, three years after date, I promise to pay to B. Bank, or order, the sum of $2,500 at his office in Butte, Montana, with interest at the rate of two per cent per month, payable monthly. The privilege hereby granted to the maker of this note to pay any amount not exceeding $200 per month thereon. Interest to be reduced according to such payments. Payment to be made on interest day. (Signed) Mary T. Doherty."

At the same time and place, in order to secure the said note, the maker executed two mortgages, a chattel mortgage on certain personal property in Butte, and a real estate mortgage on certain real estate in Seattle, this state. The property included in the chattel mortgage was afterwards sold, and the proceeds of the sale amounted to $96. A short time after the note and mortgages were made, the said Mary T. Doherty died, testate, in Montana. Her will was thereafter admitted to probate in King county, in this state, and letters testamentary with the will annexed issued to appellant

Maurice D. Leehey. Her minor son, the appellant Earle Doherty, a resident of California, was her sole devisee. On March 9, 1901, the respondent brought an action in the superior court of King county to foreclose his real estate mortgage, and at that time filed a *lis pendens* in the office of the county auditor of King county. Subsequently a judgment of foreclosure was entered, and an appeal was taken therefrom to this court. We reversed the judgment, for the reason that the debt was not then due. *Bank v. Doherty,* 29 Wash. 233, 69 Pac. 732. The appellants in that action, Earle Doherty and Mr. Leehey, administrator, were awarded costs therein against Mr. Bank, for the sum of $101.45.

The original note and mortgage had been introduced in evidence by the plaintiffs in that case, as exhibits, and were transmitted here with the record, where they were held by the clerk of this court. After a remittitur in that case had gone down, the parties stipulated in writing that the exhibits might be returned to the clerk of the superior court, to be held by him subject to the demand of the party who introduced the same in evidence. After demand had been made upon Mr. Bank to pay the judgment for costs, as above stated, and he had neglected to do so, an execution was issued at the request of the appellants in that case, and the sheriff levied upon the original note and mortgage, and took the same from the possession of the clerk. The note and mortgage were advertised for sale and, on December 1, 1902, were sold at sheriff's sale to C. L. Byron, defendant in this action, for $110.20, being the amount of the judgment and accrued costs. The sale was subsequently confirmed, and the note and mortgage were delivered to Mr. Byron. Neither Mr. Bank nor his attorneys had any actual notice of the seizure and sale of the note and mortgage. The note had been indorsed in blank by the payee some time before it was introduced in evidence in the first foreclosure action. After the sale to Mr. Byron, the words "pay to C. L. Byron or

order" were written on the note above the respondent's signature.

On December 16, 1902, the appellant Leehey, as administrator of the estate, petitioned the probate court for leave to place another mortgage upon the property described in respondent's mortgage, for the purpose of procuring money with which to pay the respondent's mortgage, then held by C. L. Byron under the said sheriff's sale. On January 13, 1903, the respondent, Mr. Bank, and his attorneys, upon learning that the note and mortgage had been sold, filed a motion to set aside the sale in the original foreclosure action out of which the execution issued. After many continuances of the hearing, and some amendments to the motion, the motion was finally heard, and on April 10, 1903, the superior court of King county made an order setting aside the sale. This order was subsequently affirmed, on appeal, by this court. *Bank v. Doherty,* 37 Wash. 32, 79 Pac. 486.

In the meantime, on February 20, 1903, an order was entered in probate, authorizing the administrator to mortgage the property for the purpose of paying off respondent's note and mortgage while it was held by Mr. Byron. Soon after the sale of the note and mortgage to Mr. Byron, Mr. Leehey, the administrator of the estate of Mary Doherty, deceased, went to Butte, Montana, and there informed J. S. Dutton and Adolph Pincus, two creditors of the estate, that the note and mortgage executed to Mr. Bank were then held by Mr. Byron, and could be satisfied for $2,200; that the mortgaged property was worth at least $3,000; and requested Mr. Dutton and Mr. Pincus to advance $2,200 for the purpose of taking up respondent's note and mortgage, and promising that he, as administrator, would obtain leave of the probate court to execute a new mortgage on the property to secure them for the $2,200, and that by means of such mortgage he would permit them to acquire the title to the property and thus make themselves whole on the estate. Mr. Pincus and Mr. Dutton agreed to this, and while the motion to vacate

the sale of the note and mortgage to Mr. Byron was pending, appellant Leehey, as administrator, executed a mortgage to Mr. Dutton for the sum of $2,200, and Mr. Byron thereupon acknowledged satisfaction of the respondent's note and mortgage, and delivered the same to Mr. Dutton, who thereupon sent to Mr. Leehey a draft for the amount agreed upon, $1,100 being contributed by Mr. Dutton and $1,100 by Mr. Pincus. Mr. Leehey thereupon recorded the mortgage to Mr. Dutton.

After the sale of respondent's note and mortgage was set aside by the court, and after the same became due, respondent brought this action to foreclose his mortgage, and made all persons claiming any interest in the property parties to the foreclosure proceeding. The appellant Dutton filed a cross-complaint, setting up his mortgage, and praying that the same be also foreclosed, and that he be decreed to be a prior mortgagee. At the trial, the court found the facts in favor of the respondent Bank, and that the appellant Dutton took his mortgage with notice and knowledge of respondent's mortgage, and was therefore a subsequent mortgagee. The judgment of the lower court was in favor of the respondent Bank, for the full amount of the note, with interest at two per cent per month from its date to the date of the judgment, and his mortgage was decreed a first lien upon the property for the amount thereof. Appellant Dutton was also given judgment for the amount of the note and mortgage standing in his name, but the court found that he took his mortgage with notice of the respondent's mortgage, and the lien was therefore declared subsequent to respondent's mortgage. The administrator Leehey and the legatee Doherty appeal from the judgment, claiming (1) that the note given to respondent Bank is usurious; (2) that it does not bear interest after maturity at the rate of two per cent per month, and (3) that respondent is not the owner thereof. Mr. Dutton appeals separately, claiming that the court erred in finding that his mortgage was subsequent to respondent's mortgage.

It is apparently conceded that both the note and mortgage sued on by the respondent Bank are Montana contracts. If not conceded, the record conclusively shows that both the maker and the payee of the note and mortgage were *bona fide* residents of Butte, Montana. The note was executed there and was payable there. The mortgage was also executed and delivered at the same time and place as the note. But it described property in King county in this state, and was sent here for record. It is proved and not disputed that the rate of interest provided for in the note and mortgage was valid in the state of Montana, where the contract was made and where it was to be performed. Under these facts there can be no escape from the conclusion that the contract was a Montana contract and was not usurious there. But appellants argue that, while the law of the place of the contract governs as to the interpretation and validity of the note, the law of the forum governs as to remedies for its enforcement. This position is no doubt correct. We said, in *La Selle v. Woolery*, 14 Wash. 70, 44 Pac. 115, 53 Am. St. 855, 32 L. R. A. 73:

"The settled rule is that the law of the place where the contract is made must govern in determining the character, construction and validity of such contract; while the law of the place where suit is instituted upon the contract governs as to "the nature, extent and form of the remedy.' "

Appellants further contend that the usury law of this state affects only the remedy, not the substance of such contracts, and we are cited to Bal. Code, § 3671 (Pierce's Code, § 5706), in support thereof. This is true when applied to contracts executed or to be performed within the state, but it has no application to valid contracts made without the state, and which are governed by the law of another state as to their character, construction and validity. The contract in this case being a valid and binding contract in the state of Montana, the mere fact that its payment was secured by a mortgage on property in this state does not change its character or render it subject to the usury laws of this state. The

mortgage is but the means of securing to the payee what the maker has agreed to pay at the place named in the note. *De Wolf v. Johnson,* 10 Wheat. 367, 6 L. Ed. 438; *Call v. Palmer,* 116 U. S. 98, 6 Sup. Ct. 301, 29 L. Ed. 559; *Coghlan v. South Carolina R. Co.,* 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951. The remedy for the foreclosure of the mortgage, being the practice of the courts, is governed, of course, by the laws of this state. *La Selle v. Woolery, supra.* The amount due upon the note is determined by the substance of the note itself, and not by any remedy to enforce it. When the lower court found that the contract was a Montana contract, valid in that state, the terms of the contract determined the amount due, and will be enforced accordingly.

It will be observed by examining the note hereinbefore set out that the maker promised to pay $2,500 three years after date, with interest at the rate of two per cent per month. No provision is made for any rate of interest after maturity. The statute of Montana, as shown and admitted by the pleadings, provides that "unless there is an express contract in writing fixing a different rate, interest is payable on all moneys at the rate of eight per cent per annum after they become due on any instrument of writing," etc. Section 2585, Civil Code of Montana, as amended in 1899. The trial court in this case computed interest, from the date of the note to the date of the decree, at two per cent per month, making a total, after deducting the credit of $96, of $5,596.66, and found that amount to be due. An exception was taken to this finding, as follows: "Because the evidence is insufficient to support said finding, and the same is contrary to the evidence," and for other specified reasons. Respondent contends that this exception is not sufficient to raise the question now presented as to the amount of interest due. We think it is sufficient, under the provisions of Bal. Code, § 5055.

Appellants rely upon the decision of this court in *Palmer v. Laberee,* 23 Wash. 409, 63 Pac. 216. That was a case

where the question arose as to the amount of interest which should be allowed upon a judgment reviving a prior judgment, and this court there held that interest should be allowed at the legal rate where the judgment revived did not recite the amount of interest it should draw. It will be seen that the exact point involved in this case was not before the court in that case, but in discussing the question then before us, reasoning by analogy, we said:

"It will be seen from *Brewster v. Wakefield, supra,* and *Ludwick v. Huntzinger, supra,* that where a note is entirely silent as to interest after it is due, the creditor is entitled to interest by operation of law; and that until the note became payable the agreement of the parties regulated the allowance and the rate of interest, but after that the law interposed not only to allow, but to regulate, the rate of interest that should be allowed the creditor for and on account of the illegal detention of the debt."

This statement of the rule is directly in point in the case now before us.

Counsel for respondent contends that, where there is no evidence to show a contrary intention, the law will presume that it was the intention of the parties that the money should bear the rate specified in the note from its date until such time as a judgment might be entered thereon, and that this is in accord with the great weight of authority in this country, and many cases are cited to support this contention. It is unnecessary to review these authorities because, where there is a statute upon the subject, the statute must control. As we have seen above, the note in question was made in Montana by *bona fide* residents of that state. It was payable there, and the parties to it must have contracted with reference to the law of that state as it existed at the time. The statute in force at the time, as quoted above, provided that interest is payable on all moneys at the rate of eight per cent per annum after they become due, on any instrument in writing, unless there is an express contract in writing fixing a different rate. This statute seems clear and conclusive of

the question. It refers especially to moneys after they become due, and fixes the rate of interest at eight per cent per annum unless the writing fixes a different rate. No decisions of the courts of Montana have been called to our attention construing this section, and we have been unable to find any. We must, therefore, give it the plain meaning which it was evidently intended to have. If the parties had intended the note in question to draw interest at the rate of two per cent per month after maturity, it would have been an easy matter to have placed such intention beyond doubt by simply adding the words "until paid" after the words "two per cent per month." They did not do so, and we must, therefore, conclude that the contract contained all of the agreement, and that the parties intended to let the law fix the rate of interest after maturity, if the note should not be paid when it became due. The lower court was therefore in error in computing interest at two per cent per month after maturity.

The last point made by appellants Doherty and Leehey is that the respondent is not the owner of the note, because it was sold at execution sale. This question was settled by us in the case of *Bank v. Doherty,* 37 Wash. 32, 79 Pac. 486.

The appellant Dutton contends that the court erred in finding his mortgage subsequent to the respondent's mortgage. This question depends upon the facts. There is some conflict in the evidence as to whether Mr. Dutton had actual notice of the condition of the sale of respondent's note and mortgage; but the circumstances surrounding the whole transaction lead us to believe that he had actual notice and knowledge of the whole transaction. He was not a party to it, and probably knew nothing about the proceedings until after the sale had taken place. But before he advanced his money and took his mortgage, we are satisfied that both Mr. Dutton and Mr. Pincus knew all about the sale and the purpose of it. We are further of the opinion that Mr. Dutton was bound by the constructive notice afforded by the *lis pendens* filed a'

the time the original foreclosure action was begun. But actual notice that respondent's mortgage had not been regularly satisfied was sufficient.

The conclusion we have reached upon the question of interest necessitates a modification of the judgment entered at the trial. The court rendered judgment for $5,596.16 and $250 attorney's fees and costs, in favor of respondent Bank. The amount of the judgment should have been $4,662.33, and for $250 attorney's fees and for costs. The judgment was, therefore, $934.83 in excess of what it should have been. No supersedeas bond was given on the appeal, and it now appears from the supplemental record on file in this court that the mortgaged property was sold under the decree and bid in by respondent for $5,500, and that the sale was confirmed on October 28, 1905, leaving a deficiency judgment in favor of respondent for $448.90. In view of these facts, it is ordered that the respondent satisfy the deficiency judgment and pay to the clerk of the court the sum of $445.93, within thirty days after the remittitur is sent down, which last named sum shall be credited upon the judgment in favor of appellant Dutton. If respondent shall not comply with this order as stated above, it is ordered that the judgment appealed from be vacated, and that a new judgment be entered in harmony with the views herein expressed, and a new sale of the mortgaged property had thereunder. Appellants shall recover costs of this appeal against respondent.

CROW, FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5856. Decided March 17, 1906.]

WALTER C. JONES *et al.*, *Respondents*, v. NORTH PACIFIC FISH & OIL COMPANY *et al.*, *Defendants*, M. B. BOSWORTH, *Appellant*.

CHATTEL MORTGAGES—RECORDING—REMOVAL TO ANOTHER STATE—CONSENT OF MORTGAGEE. The rule that a chattel mortgage, valid and recorded at the situs of the property, imparts notice to third persons after the removal of the property to another state, has no application where the mortgagee consented to such removal, the same amounting to a waiver of the mortgage except as to the mortgagor.

SAME—POSSESSION OF MORTGAGE—UNAUTHORIZED ACT OF INSOLVENT CORPORATION. A mortgagee, who obtains possession of the property through the unauthorized acts of the officers of the mortgagor, an insolvent corporation, can thereby obtain no preference over other creditors who were not bound by notice of the mortgage.

APPEAL—REVIEW—APPOINTMENT OF RECEIVER. The propriety of appointing a receiver must be raised by a direct appeal from the order of appointment, and cannot be questioned upon an appeal from a judgment distributing the proceeds of the receiver's sale.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 3, 1905, upon findings in favor of the plaintiffs, after a trial before the court without a jury, decreeing a distribution of the assets of an insolvent corporation. Affirmed.

Sweeney & Steiner, for appellant.

Ira Bronson and *D. B. Trefethen*, for respondents.

FULLERTON, J.—The defendant the North Pacific Fish & Oil Company is a corporation organized and existing under and by virtue of the laws of this state, having its principal place of business in the city of Seattle. During the fishing season of 1904 it engaged in the business of catching and curing fish, at Grace Harbor, in the territory of Alaska. On its catch for that season, together with certain of its other

1Reported in 84 Pac. 1122.

personal property at that place, it gave a chattel mortgage to the appellant, M. B. Bosworth, to secure a promissory note it was owing him, amounting to the sum of $1,075. The mortgage was duly recorded according to the laws of Alaska governing the recording of such instruments. The respondents Jones, Hanson, Farner, and Boyd, were employees of the defendant corporation, and assisted in catching and curing the fish which the appellant's mortgage covered. In the early part of November, 1904, the fish were shipped to the city of Seattle by the defendant corporation, with the knowledge and consent of the appellant. Shortly after the arrival of the fish in Seattle, the appellant obtained possession of the bill of lading from an office of the company at that place, and started to repack the fish for shipment to Japan; but shortly afterwards gave a bill of sale of the same to the defendant Kelly-Clark Company; this sale, however, seems not to have been consummated.

About this time the respondents above named filed a laborers' lien upon the fish to secure the payment of certain wages due them from the defendant corporation, which they had earned while in the employ of the corporation in Alasaka in catching and curing the fish. On filing the lien, they began this action to foreclose the same, and applied for and, after notice and hearing, obtained the appointment of a receiver to take charge of the property pending the determination of the action. The receiver took the property into his possession, and thereafter sold it under an order of court, and at the time of final judgment, held the proceeds of the sale in lieu of the property.

The appellant defended the action, claiming a superior lien thereon by virtue of his chattel mortgage and his possession under the bill of lading. After a trial the court held that neither the appellant nor the respondents had a lien upon the fish, but held that the corporation was insolvent and that both parties were entitled to share in its property,

and it apportioned the same between them according to the amounts of their respective demands.

The sum received by the receiver from the sale of the fish was sufficient to satisfy the appellant's demand, and he contends that it was error on the part of the court not to direct that his demand be paid in full before any part of the fund was distributed to the respondents. The appellant bases his right to be satisfied out of the fund on two grounds: (1) That he had a first lien upon the property by virtue of his mortgage; and, (2) that the property had been turned over to him in satisfaction of his debt, and was lawfully in his possession when taken from him by the receiver under the order of the court.

In support of his first contention, the appellant cites and relies upon that class of cases which maintain the doctrine that a chattel mortgage, duly executed and recorded at the then situs of the property, imparts notice to all persons who buy or otherwise obtain possession of the property in another state to which it has been removed by the mortgagor without the consent of the mortgagee. Without inquiring whether, owing to our somewhat peculiar recording acts, this rule is applicable to mortgaged property brought within this state from another jurisdiction, we think it inapplicable to the facts shown by this record, even were the rule accorded its fullest extent. A mortgage duly executed and recorded in one state is given effect in another by virtue of the rule of comity that exists between the states, and applies only in cases where the removal is made without the knowledge or consent of the mortgagee. Consent by the mortgagee that the property may be taken from the situs of the mortgage is a waiver of the mortgage as against every person except the mortgagor; hence, a mortgagee who consents to the removal of mortgaged property from the situs of the mortgage cannot be heard to insist, as against strangers thereto, that it has effect outside of its situs. So here, inasmuch as the appellant consented to the removal of the property from the territory

of Alaska to this state, he waived his mortgage, as against the respondents, who seized the property as creditors of the mortgagor.

The claim that the property had been turned over to him in satisfaction of his debt, and that he was lawfully in possession of the same at the time it was taken possession of by the receiver, is also without foundation. The trial court found, and we think the evidence justifies the finding, that the officers of the corporation who turned the bill of lading over to the appellant had no authority to act for the corporation; and it does not appear that the corporation ratified, or attempted to ratify, the act. This being true, the acts of these officers were not the acts of the corporation, and the appellant was a trespasser when he sought to take possession of the property. One creditor cannot obtain a preference right over another by wrongfully taking the property of the common debtor into his possession. A seizure of property, to give preference rights, must be a lawful seizure, one made under the authority of law; and a seizure which amounts to trespass is not a lawful seizure.

The appellant complains that the court was without authority to appoint a receiver, but we think it beyond question that the court had jurisdiction to make the appointment. Questions as to the propriety of the order of appointment can only be raised by an appeal from the order itself; they will not be reviewed on appeal from the final judgment.

On the whole we think the judgment was as favorable to the appellant as the facts and law of the case warranted. It will therefore stand affirmed.

MOUNT, C. J., HADLEY, CROW, and DUNBAR, JJ., concur.

[No. 5923. Decided March 17, 1906.]

W. HENDRYX *et al., Appellants,* v. PEOPLE'S UNITED CHURCH OF SPOKANE, WASHINGTON, *et al., Respondents.*[1]

RELIGIOUS SOCIETIES — FRAUDULENT EXPULSION — DIVERSION OF PROPERTY—COURTS—JURISDICTION—PARTIES—CAPACITY TO SUE. The courts have jurisdiction of an action brought by persons claiming to be members of a church, who allege a wrongful and fraudulent attempt to expel them from the society, and a fraudulent diversion of the church property to uses foreign to the purposes of the church, and it is error to dismiss the action for want of capacity to sue upon its appearing that the records of the church show the plaintiffs to have been expelled; since no ecclesiastical question is involved, and equity will protect from a fraudulent or void expulsion, or wrongful diversion of the property.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered June 15, 1905, upon a finding by the court that the plaintiffs had no capacity to sue, dismissing an action brought on behalf of the members of a church to cancel a deed and for an accounting. **Reversed.**

L. H. Prather, for appellants.

Graves & Graves, and *W. H. Plummer,* for respondents, cited, *inter alia*: *Shannon v. Frost,* 3 B. Mon. 253; *Watson v. Jones,* 13 Wall. 679, 20 L. Ed. 666; *Nance v. Busby,* 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801; *Bouldin v. Alexander,* 15 Wall. 131, 21 L. Ed. 69; *Hundley v. Collins,* 131 Ala. 234, 32 South. 575, 90 Am. St. 33; *Sale v. First Regular Baptist Church,* 62 Iowa 26, 17 N. W. 143, 49 Am. Rep. 136; *Ingleheart v. Rowe,* 20 Ky. Law 821, 47 S. W. 575; *Grosvenor v. United Society,* 118 Mass. 78; *Krecker v. Shirey,* 163 Pa. St. 534, 30 Atl. 440, 29 L. R. A. 476; *Trustees v. Harris,* 73 Conn. 216, 47 Atl. 116, 50 L. R. A. 636; *O'Donovan v. Chatard,* 97 Ind. 421, 49 Am. Rep. 462; *Fitzgerald v. Robinson,* 112 Mass. 371; *Pounder v. Ashe,*

[1]Reported in 84 Pac. 1123.

44 Neb. 672, 63 N. W. 48; *Powers v. Budy*, 45 Neb. 208, 63 N. W. 476; *Herman v. Plummer*, 20 Wash 363, 55 Pac. 315.

DUNBAR, J.—This is an action to cancel a certain deed, purporting to have been made by the People's United Church of Spokane, Washington, to the defendant Thomas Hye, for an accounting with the defendant David N. McInturff, and for the appointment of a receiver for all the property of said church. The substance of the complaint, after alleging that the People's United Church of Spokane, Washington, is a religious corporation, organized for the purpose of maintaining the worship of Almighty God, charitable purposes, and support of the widows of deceased members of said church, the business affairs of which are managed by a board of trustees, and that the church was the owner and in possession of certain real estate and personal property, is to the effect that, about five years ago, the said McInturff, the pastor of said church, and his wife, the defendant Eugenie L. McInturff, conceived the intent of getting possession of all of said property for their own use and benefit, and of selling and trading it off for other property outside of the state of Washington, with fraudulent intent to convert the same to their own use and benefit, and for that purpose they then began, and continuously thereafter pursued, a course of false and fraudulent conduct in their treatment of the members of said church and its board of trustees and its property, by which the said McInturff used his office of pastor and spiritual adviser of said board and members to induce them to allow him to manage the business affairs of said church and its property, representing to them that he could heal them of disease and make them miserable or happy as he wished, and that he would do everything for the benefit of the church; that by such means he gained the confidence of said members and board to such an extent that many of the members and trus-

tees did whatever he requested them to do, and if any one of them showed opposition to his wishes, he peremptorily called pretended meetings of the church and of the board of trustees and by said influence, had them expelled, without accusation, charge, notice, or trial, and had others of his choice and who were willing to do his bidding put in as members of the church and board of trustees in their places; that on the 8th day of February, 1905, the defendants, pretending to act as trustees of said church, but in fact acting under the procurement and instigation of said McInturff in aid of his said fraudulent intent, made, executed and delivered to said defendant Thomas Hye a deed to all of said church's real estate, and a bill of sale of all of said church's personal property in the state of Idaho, for the purpose of there establishing a community colony, which was entirely outside of the purposes of said church corporation, and for the use and benefit of said McInturff; that the said deed was not the deed of said church, and that the said pretended trustees who signed said deed were not at that time trustees of said church, and had no authority from said church to execute said deed; that the defendant Thomas Hye at all times had notice of all the facts hereinbefore set forth; that the said disposition of said church property would destroy said church and leave it no means of support or maintenance; that said McInturff during said times had by his said influence got possession of large sums of money for which he has failed and refused to account; that the plaintiffs were at all times members of said church, and brought this action on behalf of themselves and all other members of said church.

The answer was, in effect, a denial of the allegations of the complaint. At the beginning of the trial, the defendants moved the court to take up and determine, before entering into the trial of any other issue of fact, the question whether or not plaintiffs were members of said church at the time of bringing said action, to which plaintiffs objected because there was no plea in abatement. The court overruled said

objection, to which ruling the plaintiffs excepted, and thereupon the court took up and tried the question of plaintiffs' membership, deciding that they were not members of the church at the time of the commencement of the action, and that they therefore had no interest in the church property and were not competent to bring the action, and the cause was dismissed.

The records of the church were introduced by the respondents, showing that the appellants at a certain time had been expelled. It was the contention of the appellants, and they so testified, that they had not been expelled; that they had had no notice of any trial; that the alleged expulsion was fraudulent and illegal from its inception. From the judgment of dismissal, the appeal is taken.

With the view we take of the merits of the case, it is not necessary to discuss the question of pleadings, raised by the appellants in their first assignment of error, viz., that there not having been any plea in abatement, the question of the membership of the appellants was not put in issue. It is the contention of the appellants that a church corporation cannot expel a member of the church arbitrarily, without charges, notice, or trial, as being opposed to the objects of the corporation and opposed to public policy. In this case the manual introduced in evidence permitted the expulsion of a member without formal trial, but provided that he should be restored to membership on his repentance; and it is contended by the appellants that the two provisions taken together necessarily imply the commission of some offense as the cause of expulsion, else no repentance would be required for restoration. Cases are cited to show that property given or set apart to a church or religious association, for its use and enjoyment and the promulgation of its adopted faith and teachings, is, by said church or association, held in trust for that purpose, and any members of the church or association less than the whole may not divert it therefrom; that the action of one faction in the church in declaring, without notice, hearing, or

evidence, the members of the other faction withdrawn or suspended, will, in a civil action involving property rights, be considered as of no effect.

It is contended by the respondents that, this organization having adopted a creed and made a provision for church government, one of the provisions being that it had power to expel members of the local church with or without formal trial, its action was final; and that, inasmuch as in this country the church and state are divorced, the state shall no more be permitted to interfere with the affairs of the church than will the church be permitted to interfere with the affairs of the state; that the courts will protect the civil rights, but never when, in order to do so, it is necessary to review, revise, or set aside the action of an ecclesiastical tribunal dealing with matters of church doctrine or discipline; that the court will only go so far as to inquire whether it is a church, and whether the tribunal which has acted is the one endowed with power in the premises by the church; that these questions settled in the affirmative, the courts cannot inquire as to the motives which actuated that tribunal in its action, nor whether it proceeded with the usual legal formalities, or with those prescribed by the laws of the church; that the mere fact of action is conclusive, and that a party who has been expelled from a church organization could not be heard to say in a court of justice that such expulsion was illegal; but that the question of expulsion having been by the rules of the society relegated to the ecclesiastical body, its decision in that respect is final and not reviewable. Many cases are cited to sustain this broad ground, all of which we have examined, and we have also examined many others not cited in the briefs, the question being an important and interesting one. But the three principal cases—the ones upon which all or most of the other decisions hinge—are the cases of *Shannon v. Frost,* 3 B. Mon. (Ky.) 253; *Watson v. Jones,* 13 Wall. 679, 20 L. Ed. 666, and *Nance v. Busby,* 91 Tenn. 303, 18 S. W. 874, 15 L. R. A. 801.

Shannon v. Frost, supra, was where two discordant and dislocated parties of a Baptist church in Frankfort, Kentucky, were litigating their respective claims to the house of public worship, erected by the church on ground conveyed years before. In this case, both factions were attempting to use the church, and to deprive the other faction of its use, and the court held that the rights of the parties must depend on the terms and legal effect of the conveyance to the church, on the acts of that church for governing and preserving itself as a distinct Christian society, and on the common law of the land; and that the state court, having no ecclesiastical jurisdiction could not revise or question ordinary acts of church discipline or excision, saying:

"Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. And these we must decide, as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church. We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for, whether right or wrong, the act of excommunication must as to the fact of membership, be law to this court."

And it was held that, inasmuch as the conveyance was to the use of the Baptist church, only those who were members of the church at the time of the commencement of the action were interested in the property as a *cestui que trust.* The court further said, in relation to this question:

"Having once associated themselves with many others, as an organized band of professing Christians, they thereby voluntarily subjected themselves to the disciplinary and even expulsive power of that body. The voice of the majority has prevailed against them. They by that fiat, ceased to be members of that association, and with the loss of their membership they have lost all the privileges and legal rights to which, as members, they were ever entitled. Their only remedy now is, therefore, in their own bosoms, in a conscious-

ness of their own *moral* rectitude, and in the consolations of that religious faith and those Christian graces which, under all temporal trials, will ever sustain the faithful Christian and adorn the pathway of his earthly pilgrimage."

Watson v. Jones, supra, decided by the supreme court of the United States, Justice Miller speaking for the court, virtually laid down the same rule. In that case the controversy arose in the Presbyterian church, over the question of slavery, and it was held that in cases where the right of property in a civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it. In this case, as in the ones preceding, the church became divided, each faction claiming that it constituted the true Presbytery and true Synod, each faction claiming that the other had departed from the true teachings of the church and the articles of the faith subscribed to. The court stated that the issues showed that it was a separation of the original church members and officers into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut street Presbyterian church, and denied the right of the other to any such claim. In that case the rule was laid down that, where property had been dedicated to advance certain religious doctrines, it was the duty of the civil courts to see that the property so dedicated was not diverted from the trust which was thus attached to its use; and that so long as there were persons qualified within the meaning of the dedication, and who were also willing to teach the doctrines or principles prescribed in the act of dedication, the courts would prevent the diversion of the property or fund to other and different uses; that a person who built and dedicated a house to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity has a right to expect that the law will prevent that

property from being used as a means of support and dissemination of the Unitarian doctrine and as a place of Unitarian worship. While there are many things said in this case which tend to support the doctrine claimed by the respondents, the announcement just made, it seems to us, clearly supports the appellants' contention in this case. According to the allegations of the complaint, which must be taken as true in this case, the property which was collected and necessarily dedicated by the organization of the church for the purposes expressed in the manual of the church is to be diverted for purposes which are entirely foreign to the objects of the organization. It is conceded by the court in this case that the doctrine of the English courts is that the civil courts would take jurisdiction to determine even ecclesiastical questions; but the court, upon the theory of the divorcement of church and state in this country, took the other view, saying:

"In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them."

Nance v. Busby, supra, a Tennessee case, was a case arising out of dissensions in the Primitive Baptist church in that state, each faction claiming to be the true church and observing the proper ordinances, the plaintiffs alleging that the defendants had abandoned the celebration of the Lord's Supper; that they had ceased to observe the ordinance of the washing of feet; and alleging various other delinquencies; and it was held there that the court would be bound by the final determination of the ecclesiastical tribunal to which the questions were submitted. In passing upon this question, however, the court said, in speaking of its refusal to take

jurisdiction of the question of whether the excommunications complained of were illegal:

"A different question would be presented if it appeared that *before* such sentence of excommunication the majority had abandoned the faith and practice of the original beneficiaries, and that they had been cut off for adherence to the old ways by such majority, as a mere scheme to better enable them to misapply the property. Such a charge was intimated in the bill. But the verdict of the jury sets at rest every suggestion of heresy or departure from the 'faith and order' of the original organism antecedent to the acts of expulsion complained of."

So that it will readily be seen that the court in that case, under the allegations of the complaint in this case, would have held that the question of the expulsion of the members was a question which the court would take jurisdiction of.

But, conceding the general rule to be as announced by these cases, yet, if beneath all there was a fraudulent scheme to expel these members for the purpose of wrongfully obtaining control of the property of the organization and diverting it from its original channel, the law will not permit the fraud to be consummated. For,notwithstanding the fact that appellants joined an organization which provided that they might be summarily expelled upon entering the organization, there was an implied obligation or contract that the members would be fairly treated and that good faith would be maintained between them. Church organizations are largely based upon faith—primarily, faith in God and his teachings; secondarily, faith in and reliance upon each other. They are oragnizations which peculiarly call for this reliance. It is the very basis of their existence. It is recommended as a virtue and commanded as a duty, and the constant exercise of faith, charity, and forbearance necessarily makes members of such organizations easy victims for the wily schemer who is willing to don the livery of Heaven to more effectively serve the devil; and they should not be held to too close a knowledge of the arbitrary rules of the society

in relation to the manner of their admission or expulsion, questions ordinarily entirely unthought of and neglected by them in the consideration of the more important subject which moves and induces them at the time of their admission to the church.

It is true that in this country there is what is termed a separation of church and state. The state maintains no church, and absolute individual liberty is granted to every man to worship God according to the dictates of his own conscience, or not to worship Him at all. But it does not follow from this that church property is placed beyond the pale of protection by the law; or that the law will not compel the trutsees of such property to honestly and faithfully carry out the duties of their trust in relation to this kind of property, as well as any other kind. It may be conceded that the courts will not assume to decide purely ecclesiastical questions and substitute their views for the views of ecclesiastical authorities or judicatories, for, as said by Judge Miller in *Waston v. Jones, supra*:

"Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collection of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so."

But in this case, unlike the one under discussion by the learned judge, there is no ecclesiastical question involved. It is not a question where a schism has arisen in a church, where there is any contention over articles of faith, or the

construction of creeds, or the construction of the Bible, or any of those burning questions which so frequently shake churches to their center—questions which are theological and therefore ecclesiastical, and must of necessity be determined by ecclesiastical authority; but the bald question here is, can a man or set of men, or a majority of the church organization, by chicanery, deceit and fraud, divert the property of a church organization to a purpose entirely foreign to the purposes of the organization, for their own selfish benefit, whether by the expulsion of members or in any other fraudulent manner? Neither the law nor public policy will sustain such a rule. Fraud vitiates all transactions and, if members are expelled for a fraudulent purpose to carry out a fraudulent scheme, the expulsion is a void act, and of no force or effect whatever. Equity will compel fair dealing, disregarding all forms and subterfuges, and looking only to the substance of things.

In this case we think the court erred in denying the right of the appellants to be heard on the questions raised in the complaint. The cause will be reversed, and remanded with instructions to proceed with the trial of the cause.

MOUNT, C. J., HADLEY, FULLERTON, CROW, and ROOT, JJ., concur.

[No. 5824. Decided March 17, 1906.]

M. F. Gibson, *as Administrator of the Estate of Laura Slater, Deceased, Respondent,* v. Frank Slater *et al., Appellants.*[1]

Executors and Administrators—Possession of Real Estate—Statutes—Implied Repeal. Bal. Code, § 4640, providing that the title to real estate of which an intestate dies seized shall vest immediately in the heirs at law, whose right to possession shall be valid as against all persons except only an executor or administrator when appointed, is not inconsistent with and does not impliedly repeal the earlier law, Bal. Code, §§ 6200, 6296 and 6297, giving an administrator the right to the possession of the real estate.

Same—Rights of Administrator—Action Against Heir. An administrator of the estate of a married woman, appointed within six years after her death, in the interest of heirs at law, may recover possession of the real estate seized by the husband and held adversely to the other heirs, even if the deceased left no debts.

Appeal from a judgment of the superior court for Lincoln county, Poindexter, J., entered March 30, 1905, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in consolidated actions to recover possession of real property and quiet title. Affirmed.

H. A. P. Myers, C. S. Voorhees, and *Reese H. Voorhees,* for appellants.

A. C. Routhe and *Martin & Grant,* for respondent.

Crow, J.—On February 4, 1903, respondent M. F. Gibson, as administrator of the estate of Laura Slater, deceased, commenced action No. 3269 in the superior court of Lincoln county, against appellants, Frank Slater and Mrs. Frank Slater, his wife, to recover possession of certain real estate, being the action in which this appeal is prosecuted. In his second amended complaint, he alleged that appellants are husband and wife; that on or about January 1, 1899, one Laura

[1]Reported in 84 Pac. 648.

Slater died, intestate, leaving certain minor heirs, and also leaving as her separate estate 240 acres of land in Lincoln county, Washington; that after her death appellant Frank Slater immediately and wrongfully seized possession of said real estate, and with his wife, Mrs. Frank Slater, has ever since retained the same; that the rental value of said land has been $1,000 per year since January 1, 1899; that on October 21, 1902, respondent M. F. Gibson was duly appointed and qualified as administrator of the estate of said Laura Slater, deceased; and that on November 15, 1902, he demanded possession of said real estate, which appellants refused, claiming to own the same.

Appellants demurred to the second amended complaint, for (1) defect of parties plaintiff, (2) defect of parties defendant, and (3) want of facts sufficient to constitute a cause of action. This demurrer being overruled, appellants answered, making certain denials, and affirmatively alleging, that prior to June 15, 1899, appellant Frank Slater, and said Laura Slater, now deceased, were husband and wife, residing in the state of Oregon, where Frank Slater owned certain real estate, which under the laws of Oregon was his individual and separate property, and to which the said Laura Slater, then his wife, had no claim; that on said June 5, 1899, appellant Frank Slater with his then wife, Laura Slater, moved to Lincoln county, Washington, where they resided until January, 1900, when said Laura Slater died, intestate, leaving surviving her as her heirs at law Edward Broadley, William Broadley, George Broadley, Frank Broadley, Susie Fawcett, Sadie Fawcett, Allen Fawcett, and Zebbie Fawcett, issue of said Laura Slater by former husbands; that on or about June 15, 1899, said Frank Slater exchanged his Oregon real estate for 160 acres of the real estate in the second amended complaint described, which then became his separate property; that on or about June 15, 1899, one Frank Broadley and his wife deeded to appellant Frank Slater the remaining 80 acres of the real estate described in the second amended complaint, which then

became the community property of said Frank Slater and his then wife, Laura Slater; that since the death of said Laura Slater, and prior to the appointment of any administrator, appellant Frank Slater had paid all debts of her estate, and that no debts were outstanding at the time of the appointment of respondent, M. F. Gibson, as administrator. Appellant Frank Slater intermarried with his present wife and co-appellant since the decease of said Laura Slater.

During the trial appellants were permitted to amend their answer by alleging that said Frank Slater, since the death of said Laura Slater, had made permanent improvements on said land of the value of $4,000. On May 9, 1904, Zebulon Fawcett and Sarah Fawcett, minors, by their guardian *ad litem,* and Susan Fawcett, three of the heirs at law of said Laura Slater, deceased, having first obtained leave of court, filed a complaint in intervention in said cause No. 3269. It is not necessary to state the allegations made therein, but in their prayer they asked that the entire 240 acres described in the second amended complaint be given into the immediate possession of respondent as administrator of the estate of Laura Slater, deceased. There is no showing that Frank Slater ever applied for letters of administration on the estate of his deceased wife in said 80 acres which he admits to have been community property, but on July 20, 1903, he instituted in the superior court of Lincoln county action No. 3405 wherein he was plaintiff, and Edward Broadley, William Broadley, George Broadley, Frank Broadley, Susie Fawcett, Sadie Fawcett, Allen Fawcett, and Zebbie Fawcett, the issue and heirs at law of Laura Slater, deceased, and M. F. Gibson, as administrator of the estate of Laura Slater, deceased, were defendants, to quiet his title to the 160 acres of said land, which in his answer in cause No. 3269 he had claimed to be his separate estate. In his complaint he made substantially the same allegations as those contained in his answer in cause No. 3269. On January 5, 1905, an order was made consolidating said causes No. 3269 and No. 3405, so that the same might

thereafter be held together and tried as one action. After this consolidation respondent, M. F. Gibson, as administrator, filed one pleading to serve as a reply to appellant's answer in cause No. 3269, and as an answer to his complaint in cause No. 3405. On February 23, 1905, the consolidated actions were tried before a jury, and the following verdict was returned:

"We, the jury duly empaneled to try the issues in the above entitled cause do find for the plaintiff as administrator of the estate of Laura Slater, deceased, that he is entitled to the possession of the following described real estate, to wit: The Northeast ¼ of Section 31, and West ½ of the Northwest ¼ of Section 32, Township 24, Range 39, E. W. M., Lincoln county, Washington, described in plaintiff's complaint. We do further find that said plaintiff, as such administrator representing the estate of Laura Slater, deceased, in his representative capacity and the heirs of the said Laura Slater, are the owners and hold the title to said property in fee simple and we assess their damage for the detention of said property in the sum of $3,600 dollars, being the rents and profits thereof."

Afterwards appellants, Frank Slater and Mrs. Frank Slater, interposed a motion for judgment in their favor *non obstante veredicto*. This motion was sustained as to the damages found, which were offset by order of the court against the value of the permanent improvements made by appellants Slater and wife. Thereupon judgment was entered upon the verdict in favor of respondent, M. F. Gibson, as administrator, for the immediate possession of all of said real estate. From said judgment, Frank Slater and Mrs. Frank Slater, his wife, have appealed to this court.

Respondent has moved to strike appellants' brief and dismiss this appeal, but as his motions are without merit they will be denied.

Appellants have not caused any statement of facts to be proposed, served or filed. Their assignments of error are all based upon the one contention that the trial court erred in

overruling their demurrer to the second amended complaint. Relying on Bal. Code, § 4640, they contend that respondent, M. F. Gibson, as administrator, has no right to the possession of said real estate, no outstanding unpaid debts of the estate being alleged in the second amended complaint. It is not urged that respondent was improperly or illegally appointed as administrator. In fact, the regularity or necessity of his appointment could not be questioned or attacked in this collateral proceeding. Appellants, in their opening brief, say:

"Under existing legislation the absence, from the second amended complaint, of any allegation of a necessity for the possession of the lands in controversy, by the administrator, for the payment of 'debts, family allowance, expenses of administration' or 'other charges for which such real estate is liable under existing laws,' is manifestly fatal to the integrity of the cause of action attempted to be asserted therein. Such allegation was absolutely essential, under the rule at common law, to the right of an administrator to the possession of the decedent's real estate, and the act of 1895 (section 4640, Ballinger), has clearly restored the common law *status,* in that behalf, in this state."

In other words, appellants simply contend that said section 4640, which was enacted in 1895, was intended by the legislature to so qualify the scope and effect of Bal. Code, §§ 6200, 6296, and 6297, as to leave the right of an administrator to the possession of real estate as it existed at common law; that he could in no event reduce the same to his possession, except for the purpose of the payment of the debts of the decedent and expenses of administration; and therefore cannot maintain this action. We think this contention cannot be sustained. Section 4640, Bal. Code, is section 1 of chapter 105, Laws 1895, p. 197, which chapter contains no section or clause purporting to repeal any previous act of the legislature. If, then, it has effected any repeal or modification of the sections to which appellants refer, such repeal or modification must necessarily be by implication.

"If two statutes on the same subject are mutually repugnant, the later act without any repealing clause operates, in the absence of expressed intent to the contrary, as a repeal of the earlier one, on the obvious principle that the enactment of provisions inconsistent with those previously existing manifests a clear intent to abolish the old law. In order that an implied repeal may result from the principles now under consideration the repugnancy appearing in the two statutes must be wholly irreconcilable, and it must also be clear and convincing, and following necessarily from the language used. Hence every effort must be used to make all acts stand, and the later act will not operate as a repeal of the earlier one, if by any reasonable construction they can be reconciled." 26 Am. & Eng. Ency. Law (2d ed.), pp. 723-726.

If there is any apparent inconsistency or repugnancy between section 4640, as a part of the Law of 1895, and the earlier sections 6200, 6296, and 6297, it is our duty to reconcile all of said sections and permit them to stand, if we can do so by any reasonable construction. We do not think they are necessarily inconsistent. Section 4640, after providing that the title to lands of which an intestate dies seized shall immediately vest in his heirs at law, further provides that,

"The title and right to possession of such lands, tenements, or hereditaments so vested in such heirs or devisees, together with the rents, issues and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, *excepting only the executor or administrator when appointed,* and persons lawfully claiming under such executor or administrator; and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements, or hereditaments and the rents, issues and profits thereof, whether letters testamentary or of administration be granted or not, from any person *except the executor or administrator* and those lawfully claiming under such executor or administrator."

This language clearly implies that the right of possession in the heirs at law shall be subject to the right of an admin-

istrator when appointed, and this is especially true if letters of administration be granted within six years from the date of death of the decedent, before debts are barred as claims against real estate. Bal. Code, § 4642. Section 6200 gives to the administrator the immediate right of possession to all real estate of which the intestate dies seized. Section 6296 makes it his duty to take possession, while § 6297 gives him authority to maintain actions for its recovery. No question is raised as to whether respondent, M. F. Gibson, as administrator, can maintain an action for possession against the heirs at law, there being no debts nor any dispute as to title, but the question is raised whether he can, as such administrator, on behalf of the estate and all of the heirs at law, maintain such an action against one, whether one of the heirs or not, who has wrongfully seized the real estate and retained possession under an adverse claim of title, thus depriving both the administrator and the heirs at law from the enjoyment of their rights. We think the administrator can maintain such an action. Appellants call attention to the fact that under Bal. Code, § 6257, an administrator has no right to sell the real estate of the decedent except to pay debts and expenses of administration. While this is true, said section in no way deprives him of his right to possession under the provisions of §§ 6200, 6296, and 6297,which right is recognized in the later act of 1895 by § 4640. We think the points raised by appellants have been substantially decided against their contention in the recent case of *Noble v. Whitten,* 38 Wash. 262, 80 Pac. 451, in which it was contended that an administrator was not entitled to any commission on the appraised value of the real estate of his intestate, as the title vested immediately in the heirs and he was not entitled to possession. After quoting from §§ 4640, 6200, 6201, 6296, and 6309, we said:

"Section 6314 provides that the administrator 'shall be allowed commission on the whole estate accounted for by him.' Under these provisions of the statute, it is too plain for argu-

ment that the administrator is entitled to the possession of the real estate, and is entitled to commissions on the whole estate, both personal and real. It was not error, therefore, for the court to allow such commissions."

In our opinion there is no inconsistency between § 4640 and the earlier provisions of our probate act. In the recent case of *Murphy v. Murphy, ante* p. 142, 84 Pac. 646, we held, under the law of 1895, Bal. Code, § 4640, *et seq.*, an attempted administration, for which application was made eleven years after the death of a testator, to have been unnecessary, and sustained the trial court in discontinuing the same, on the theory that the real estate had descended to the legatees without the necessity of any administration. This case can be distinguished from that one in several particulars: (1) No direct attack is made here on the necessity of administration by any of the heirs at law; (2) a period of six years not having elapsed between the date of the death of the intestate and the appointment of the administrator herein, any possible debts of the decedent have not been barred. In the *Murphy* case we said:

"We are of opinion that, under the facts shown, no real necessity existed for any administration in this state, eleven years having elapsed since the testator's decease, and his estate in Iowa having been fully settled there by a court of competent jurisdiction. Had any good and sufficient reason existed at any time for administration in Washington, the interested party desiring the same should have applied for the appointment of an administrator within at least six years after the death of said J. H. Murphy."

It will thus be seen that our holding in the *Murphy* case was based not only upon the provisions of § 4640, but also of § 4642. Here the appellant Frank Slater failed to procure letters of administration on the estate of his deceased wife, but instead seized upon and claimed title to all of the real estate, adversely to her heirs at law, issue by former marriages; and respondent, a little more than three years

after her death, within the six years mentioned in Bal. Code, § 4642, was appointed administrator, apparently for the express purpose of protecting the interests of said heirs, a number of whom are minors. It is true appellant contends there were no outstanding debts, and has alleged he paid all that ever existed, but that makes no difference, as the heirs at law are here entitled to have the administrator recover and distribute the real estate free from the possibility of any such liens.

In the views we have here expressed, we bear in mind the former cases of *Anrud v. Scandinavian-American Bank,* 27 Wash. 16, 67 Pac. 364, and *Griffin v. Warburton,* 23 Wash. 231, 62 Pac. 765, cited by appellants, but we do not think they tend to show that it would be an unauthorized proceeding for an administrator to institute an action to recover possession of real estate of his intestate which has been wrongfully seized and held by a party who claims adverse title to the same. Such an action would ultimately inure to the benefit of all the heirs at law, and would be a proper proceeding. We think the trial court committed no error in overruling appellants' demurrer. The second amended complaint being sufficient, it sustains the final judgment entered on the verdict of the jury, which verdict, in the absence of any statement of facts, cannot be questioned on this appeal.

The judgment is affirmed.

Mount, C. J., Dunbar, Hadley, and Fullerton, JJ., concur.

[No. 5977. Decided March 17, 1906.]

GEORGE H. MELSE, *Respondent, v.* ALASKA COMMERCIAL COMPANY, *Appellant.*[1]

MASTER AND SERVANT—NEGLIGENCE—FALL OF FREIGHT DOWN A HATCH—WARNING—DRUNKEN EMPLOYEES. A ship company is liable to an employee who, while in the performance of his duty, is injured by the fall of freight, which was negligently and recklessly lowered down the hatch, without any warning, by drunken employees, who were placed and continued in charge of the operation of unloading freight on a ship.

DAMAGES—EXCESSIVE VERDICT. A verdict for $20,000 damages for personal injuries, resulting in the amputation of a leg at the knee, sustained by a longshoreman, thirty-nine years of age, capable of earning from fifty to seventy dollars a month, is excessive, and should be reduced to $14,000.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 10, 1905, upon the verdict of a jury for $20,000 damages for personal injuries sustained by a longshoreman through the fall of freight. Affirmed on condition of remitting $6,000.

William H. Gorham, for appellant.

Benson, Hall & Higgins, and *Morris, Southard & Shipley,* for respondent.

DUNBAR, J.—The amended complaint alleges, in substance, that on or before January 21, 1903, defendant company owned and operated the steamship "Bertha;" that it employed defendant Frank Forward as first mate, defendant John Conway as a sailor and hatch tender, and Fred Anderson as boatswain; that Forward, Anderson and Conway were at all times incompetent, reckless, drunken, and unfit for the positions which they respectively occupied; that the defendant company and Forward had reasonable opportunity to know, and did know, that Anderson and Conway were in-

[1]Reported in 84 Pac. 1127.

competent, negligent, reckless, drunken, and unfit, but nevertheless they did knowingly, wilfully, and recklessly retain said boatswain and permit him to act as boatswain and control the operation of the winches, and to give orders to the sailors, and especially to winch drivers; and negligently allowed defendant John Conway to remain and act upon the ship as a hatch tender; that on January 21, 1903, while the steamer was lying at the dock at Seattle, Washington, and while Anderson was aboard acting as boatswain in charge of the sailors and winches and winchmen, and while defendant Conway was aboard acting as hatch tender, and both Anderson and Conway were in sole and complete charge of the first mate, and while the captain of the vessel was absent, Anderson and Conway became exceedingly drunk, and remained drunk in the immediate presence of Forward continually all of said day, cursing, swearing and drinking until plaintiff's injury, between three and four o'clock of the afternoon of that day; that plaintiff was employed by the defendant company as a longshoreman, and was at work as such, handling freight in the hold of said vessel, knowing nothing of the actions of either Anderson or Conway; that between three and four o'clock, the drunken boatswain negligently and carelessly attempted to operate a winch and to lower freight thereby into the hold of the vessel; that it was Conway's duty as hatch tender to keep watch down the hatch (where plaintiff was at work), and to warn any one below of danger from freight being loaded in the hold; that the drunken boatswain caused a sling load of freight to fall without any warning whatever, and without any effort on his part to prevent the same from falling, reckessly, carelessly and in a drunken manner turned the winch loose and allowed the freight to fall of its own weight nearly twenty feet upon plaintiff; that Conway negligently and carelessly failed to keep a lookout for the safety of plaintiff, and to warn plaintiff that freight was approaching the hatch, and to warn plaintiff in any manner of his danger; that plaintiff was crushed

under the weight of said cargo, his left leg crushed so that it became necessary to amputate it below the knee, and that he suffered various other injuries; and asked for damages in the sum of $75,000.

The defendant admitted the employment of Forward as first mate, and Conway as hatch tender, and of plaintiff as longshoreman; admitted that the plaintiff was crushed by a sling load of cargo; but denied all other allegations contained in plaintiff's complaint, including the employment of Anderson as boatswain. As an affirmative defense, it alleged that whatever damage and injury plaintiff sustained were caused by his own carelessness and negligence and want of care, without any fault or negligence on the part of the company, which affirmative matter was denied by plaintiff. The defendant, before answering, petitioned the court to remove the case to the Federal court, which petition was denied; and also demurred to the complaint, which demurrer was also denied. We think the court was justified in refusing the change asked for, and there seems to be no merit in the demurrer to the complaint, it plainly, in our judgment, stating a cause of action. Nor can there be any question, under the testimony, of the responsibility of the appellant for Anderson's acts. A ship company cannot intrust a drunken boatswain with authority over the sailors and disavow responsibility for the reckless exercise of that authority.

There are no questions of law in this case that have not been decided many times over by this court in opposition to appellant's contention. The testimony is conclusive, that there was the most culpable negligence on the part of the officers and agents of the appellant company; that they were intoxicated to such a degree that they handled the business of lowering the freight with the most reckless indifference to the safety of the men who were working below, neither giving timely warning of the descent of the load, or using any effort or care to send it down at a reasonable rate of speed. The respondent was in the strict performance of his duty. He

had been commanded by the captain of the ship to move some potatoes that were under the hatch coamings, being told that the steward would tell him where to put them. The steward did immediately tell him where to put them, and as he bent over to comply with this order, he was struck and crushed by the descending freight. There is no showing whatever of any contributory negligence or assumption of risk. Respondent was in the performance of his duty, yielding that ready, unquestioning obedience to orders which is so necessary upon shipboard. In the performance of that duty, he had a right to rely upon the duty of the master to furnish him a safe place in which to work, and to rely upon its duty to employ competent and reliable agents to handle the dangerous agencies which they were using in the business, the negligent use of which was without any doubt the proximate cause of the injury. We find no reversible error in the instructions given by the court, or in rulings upon the admission of testimony.

It is contended, however, by the appellant that the judgment of $20,000 which the respondent obtained is excessive, and from an examination of the record we are forced to the conclusion that the judgment is excessive. The respondent at the time of the injury was thirty-nine years old, his business was that of a longshoreman, and his testimony was that his earnings amounted to from fifty to seventy-five dollars a month, or an average of $60. A judgment of $14,000, with interest at six per cent, which is probably available, would amount to $70 a month, $10 a month more than the average which the respondent testified he earned, even conceding that he was able to obtain steady employment, and that such employment would not be affected by sickness or any of the vicissitudes of life. This would still leave the principal of $14,000, which it seems to us would be a sufficient recompense for the injuries which he received. We are therefore inclined to reduce this judgment to $14,000; and if the respondent, within sixty days from the filing of the remittitur

in the superior court, will remit the amount of $6,000 from the judgment, the judgment so amended will be affirmed; otherwise a new trial will be granted. Costs awarded to respondent.

MOUNT, C. J., HADLEY, FULLERTON, CROW, and ROOT, JJ., concur.

[No. 6084. Decided March 19, 1906.]

In the Matter of the Estate of WILLIAM WELLINGTON WHITE, *Deceased.*

THE STATE BOARD OF TAX COMMISSIONERS, *Respondent,* v. STEPHEN B. WHITE *et al., as Executors, Appellants.*[1]

TAXATION — OF INHERITANCES — STATUTES — TITLE — SUFFICIENCY. The title of Laws 1901, p. 67, which is confined to the taxation of "inheritances," is sufficiently broad to include a tax on the right of succession by will as well as by operation of law; since inheritance is commonly so employed in this connection.

Appeal from an order of the superior court for King county, Griffin, J., entered February 10, 1906, directing the payment of an inheritance tax by the executors of a will. Affirmed.

Chas. F. Munday, for appellants, contended *inter alia,* that the word "inheritance" should be construed according to its common law sense. Sutherland, Statutory Construction, p. 327, § 247; *Estate of Donahue,* 36 Cal. 329. But when the title is restrictive and confined to a special feature of a particular subject, the natural inference is that other features of the same general subject are excluded. *Fidelity Ins. Co. v. Shenandoah Val. R. Co.,* 86 Va. 1, 9 S. E. 759, 19 Am. St. 858; *Armour & Co. v. Western Const. Co.,* 36 Wash. 529, 78 Pac. 1106; *Percival v. Cowychee etc. Irr. Dist.,* 15 Wash. 480, 46 Pac. 1035. The title of an act can contain no valid provision beyond the range of the subject. Sutherland, Statu-

[1]Reported in 84 Pac. 831.

tory Construction (1891), §§ 87, 102; Cooley, Const. Lim. (5th ed.), p. 179; *Mewherter v. Price,* 11 Ind. 199; *State ex rel. Seattle Electric Co. v. Superior Court,* 28 Wash. 317, 68 Pac. 957; *Matter of Paul,* 94 N. Y. 497; *Howard v. Schneider,* 10 Kan. App. 137, 62 Pac. 435; *People v. Gadway,* 61 Mich. 285, 28 N. W. 101, 1 Am. St. 578; *State ex rel. Turner v. Coffin* (Idaho), 74 Pac. 962; *State v. Township Committee* (N. J. L.), 14 Atl. 587; *Allen v. Com'rs of Taxation,* 57 N. J. L. 303, 31 Atl. 219; *Cooper v. Springer,* 65 N. J. L. 594, 48 Atl. 605; *Watson v. State* 140 Ala. 134, 37 South. 225; *Watkins v. Bigelow,* 93 Minn. 210, 100 N. W. 1104.

The State Board of Tax Commissioners, pro se.

RUDKIN, J.—This is an appeal by the executors of the will of William Wellington White, deceased, from an order of the probate department of the superior court, directing the executors to pay to the state treasurer the sum of $166.13, pursuant to the act of March 6, 1901, Laws of 1901, page 67, commonly known as the "Inheritance Tax Law." The validity of that act, as applied to testamentary dispositions, is the only question presented on this appeal.

Section 1 of the act provides that all property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or donor, to any person in trust or otherwise, shall, for the use of the state, be subject to a tax as provided in § 2 of the act. It will thus be seen that the act imposes a tax on the right of succession, whether the property passes by will, by operation of law, or by grant or gift to take effect in possession or enjoyment upon the death of the grantor or donor. The title of

the act is as follows: "An act relating to the taxation of inheritances and providing for disposition of same," and the appellants contend that the title is not broad enough to sustain the provision imposing a tax upon property which passes by will or otherwise than by operation of law.

The word "inheritance" is no doubt properly confined to lands and tenements which pass by descent or by operation of law, but in popular use this distinction is often disregarded, and this is especially true in succession or inheritance tax laws. The terms "inherit," "inheritance," and "inheritance tax law," have thus been defined by lexicographers: Century Dictionary: "Inherit. In law it is used in contradistinction to acquiring by will, but, in popular use, this distinction is often disregarded. . . . 3. To receive by transmission in any way; have imparted to or conferred upon; acquire from any source. Inheritance. . . . 4. A possession received by gift or without purchase; a permanent possession. 5. Possession; ownership; acquisition. Inheritance Tax Law. A statute imposing a tax on those acquiring property by inheritance or will; sometimes taxing only collateral relatives and strangers, in such case commonly called collateral inheritance tax law." Webster's Unabridged Dictionary: "Inheritance. . . . 4. A possession received by gift or without purchase." Bouvier: "Inheritance. In civil law—the succession to all the rights of the deceased. It is of two kinds—that which arises by testament when the testator gives his succession to a particular person, and that which arises by operation of law, which is called succession *ab intestat.*" In contracts and wills the term "Inherit," is often construed to mean "to take," "to have," "to receive," or "to become possessed of." *Kohl v. Frederick,* 115 Iowa 517, 88 N. W. 1055; *Donald v. Forger,* 26 Misc. Rep. 16, 55 N. Y. Supp. 579; *Harris v. Dyer,* 18 R. I. 540, 28 Atl. 971; *Graham v. Knowles,* 140 Pa. St. 325, 21 Atl. 398.

In revenue laws the term "inheritance tax" is almost uni-

versally employed to designate or describe a tax on the right of succession whether by operation of law, by will, or by grant. Thus, the title of the Pennsylvania act is as follows: "An act to provide for the better collection of collateral inheritance taxes." Laws of Pennsylvania, 1887, p. 79. The title of the Maine act is, "An act to tax collateral inheritances." Laws of Maine, 1893, chap. 146. The title of the Ohio act is, "An act imposing a collateral inheritance tax." Laws of Ohio, 1893, chap. 14. "An act to impose a direct inheritance tax." Laws of Ohio, 1894, p. 166. All these acts, and others that might be cited with similar titles, contain provisions imposing a tax on devises and grants and gifts to take effect upon the death of the grantor or donor. These acts are not cited as authority to sustain the validity of the act in question, but for the purpose of showing the general and common use of the word "inheritance" in this connection. We are therefore of the opinion that the title of the act is broad enough to sustain the provision imposing a tax on the right of succession by will, as well as by operation of law.

The judgment of the court below is affirmed.

MOUNT, C. J., CROW, HADLEY, FULLERTON, ROOT, and DUNBAR, JJ., concur.

[No. 5928. Decided March 19, 1906.]

MINER A. WEBSTER, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

DAMAGES—FOR PERSONAL INJURIES—MEDICAL ATTENDANCE—FUTURE EXPENSES—INSTRUCTIONS. There is sufficient evidence to support an instruction that the jury, in assessing the damages to one who was severely injured, could take into consideration any expense for medicine and care of physicians, necessarily incurred, or that the plaintiff may in the future with reasonable probability be put to, where it appeared that physicians had been employed and attended, and that the plaintiff had not recovered and would continually suffer from permanent injuries, although the amount paid or the value was not shown.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 28, 1905, upon the verdict of a jury rendered in favor of the plaintiff in an action to recover damages for personal injuries. Affirmed.

Peters & Powell, for appellant.

Frank H. Knapp, for respondent.

MOUNT, C. J.—This action was brought to recover for personal injuries, sustained by respondent while a passenger upon one of appellant's street railway cars. At the trial appellant did not contest its liability for the injuries respondent had sustained, and the only issue tried was the extent of respondent's injuries, and the amount of damages he was entitled to recover. Considerable evidence was taken upon this issue. At the close of the testimony, the court instructed the jury, among other things, that in estimating the damages they might take into consideration "any expense for medicine and care of physicians which plaintiff has necessarily been put to by reason of such injuries, or that he may in the future with reasonable probability be put to by reason of such injuries." The jury returned a verdict in favor of respondent

[1]Reported in 85 Pac. 2.

for $3,097.50, upon which a judgment was entered, and this appeal is prosecuted.

Appellant concedes that there was evidence to show medical attendance in the past, but contends that there was no evidence to show the value of physician's services prior to the trial, and no evidence that respondent would probably need such services in the future. This is the only question presented on the merits of the appeal. While there is no direct evidence in the record that respondent had paid for medical attendance in the past, yet there was abundant to show that he had employed, and was attended by, physicians, and that respondent had been severely injured and had not recovered at the time of the trial. Dr. Willis, a witness on behalf of appellant, gave as his opinion that it was doubtful if respondent would ever recover, and said: "I should say in all probability he would improve and get a good deal better, but of course in one of his age I do not know whether he would get entirely over the effects of it or not. I think he should get over it enough so it really should not annoy him materially." Doctors Scudder and Bates, witnesses for the respondent, testified that the injury was permanent and that respondent would continue to suffer as long as he lived. This evidence was sufficient to support the instruction, because when it was shown that respondent was in need of medical attendance and had employed physicians, the presumption followed that there was some expense attached to such employment; and when it was also shown that respondent would suffer in the future, it followed that in all probability he would need medical attention for which the jury were at liberty to fix a nominal sum at least. *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 22 N. E. 402; *Gallamore v. Olympia*, 34 Wash. 379, 75 Pac. 978.

It was therefore not error for the court to give the instruction complained of. The judgment is affirmed.

CROW, HADLEY, and DUNBAR, JJ., concur.

ROOT, J., concurs in the result.

[No. 5975. Decided March 19, 1906.]

In the Matter of the Guardianship of MARGARET P. CROSBY *et al., Minors.*[1]

JOSIAH L. PETTINGILL, *Guardian, Appellant,* v. A. H. ANDERSON *et al., Respondents.*

APPEAL—FINAL ORDERS—VACATION OF LEAVE TO SUE EXECUTORS. The vacation of an order granting leave to sue executors of an estate upon a rejected claim in effect determines the right to maintain the action, and is appealable as a final order.

GUARDIAN AND WARD—ACTIONS—BY FOREIGN GUARDIAN—COURTS—JURISDICTION—LEAVE TO SUE. The superior court has jurisdiction, on the principles of comity, to grant leave to a foreign guardian of nonresident wards to maintain an action in this state against the executors of an estate, there being no statute prohibiting the same.

SAME—PROPERTY—STATUTES—CONSTRUCTION. Bal Code, § 6419, providing for the removal to another state of the "property" of nonresident wards, where the guardian is also a nonresident, applies to choses in action, in view of the provision authorizing the guardian to sue therefor.

Appeal from an order of the superior court for King county, Frater, J., entered September 22, 1905, vacating an order granting a foreign guardian leave to sue executors of the estate of a deceased person. Reversed.

William B. Allison and *Wiley, Herr & Bayley,* for appellant.

Chas. F. Munday, for respondents.

MOUNT, C. J.—On July 31, 1905, the appellant J. L. Pettingill filed a petition in the superior court of King county, praying that he be appointed guardian of the estate of Margaret P. Crosby and William A. Crosby, minors, and for permission to institute an action as foreign guardian of said minors in the courts of King county, against the estate of Benjamin B. Healy, deceased, to recover an account al-

[1]Reported in 85 Pac. 1.

leged to be due from said estate to said minors. The petition alleged, in substance, that the minors were residents of the state of Wisconsin; that the petitioner was also a resident of that state, and had theretofore been regularly appointed and qualified, according to the law of that state, as guardian of the persons and estate of said minors. A duly certified copy of the records of the probate court of LaCrosse county, Wisconsin, was attached to the petition.

The petition further alleged, that Benjamin B. Healy, deceased, was during his lifetime, indebted to the said minors in a large amount; that, at the time of his death, said Benjamin B. Healy was a resident of King county, in this state, and left a large estate therein; that Alfred H. Anderson and Lucy M. Healy were named, and are acting as, executors of the said estate of Benjamin B. Healy, deceased; that the petitioner duly presented a verified claim against said estate for the amount of the debt owing to his wards, and that the executors rejected said claim; that by reason thereof it is necessary for petitioner to bring an action in this state for the purpose of collecting the amount of said claim, and to remove the proceeds thereof to the state of Wisconsin for the benefit of said minors.

Upon filing this petition, the court made an order fixing a time for the hearing of the petition, and thirty days' notice thereof was served upon the executors of the estate of Benjamin B. Healy, deceased, and upon their attorney. At the time fixed for the hearing, no one appeared to resist the application, and the court thereupon made an order authorizing the petitioner to remove any property of his wards found in the state, and granted authority and leave to the petitioner to sue the estate of Benjamin B. Healy, deceased, on the claim set out in the petition, and to receive and remove the proceeds thereof from this state for the benefit of said wards. Thereafter, on September 7, 1905, the said J. L. Pettingill, as guardian, brought an action against the executors of the estate of Benjamin B. Healy, deceased, to

recover upon the claim which had been presented to and rejected by the executor, and which was stated in the petition. On September 12, 1905, the executors of the estate of Benjamin B. Healy, deceased, served and filed a motion and petition to vacate the order granting Mr. Pettingill a right to sue in this state. The petition and motion were based upon several grounds. The court, upon the hearing, sustained the petition and motion, and vacated and set aside the order. This appeal is from the last named order.

Respondents have interposed several motions to strike the statement of facts and dismiss the appeal. There is no merit in any of the motions. The order appealed from, in effect, determines the action brought by the appellant against the executors of the estate, because if the order permitting him to sue is vacated, he has no right to further maintain the action. The order is therefore appealable.

The only ground upon which the court would have vacated the order granting the foreign guardian leave to sue in this state was that the court had no jurisdiction to make the order. This is apparently the main contention of respondents. Certainly none of the others are well founded. We think the court had jurisdiction, upon the principle of comity, to make the order allowing the foreign guardian to maintain the action, because we have no statute prohibiting the same. Wharton on Conflict of Laws, Vol. 1 (3d ed.), at § 265a, p. 592, says:

"Many of the state legislatures have, upon principles of comity, relaxed the rule, as stated by Judge Story, requiring an ancillary appointment; and have recognized the authority of foreign guardians who make due proof of their foreign appointment and authorization, and comply with such other conditions as may be imposed. Thus, by local statutes in many states, foreign guardians of nonresident wards are authorized to receive and remove from the state, personal property of their wards in the hands of local guardians or others; and to this end they have been authorized to maintain suits within the state. Even in the absence of such a statute, it

seems to be competent for a court possessing chancery powers to order funds belonging to the ward in the hands of a resident guardian to be transmitted to, or paid over to, the domiciliary guardian. It is discretionary, however, with the local courts, even under such statutes, to refuse permission to the foreign guardian to remove the property from the state if it is for the best interests of the ward that the property should be administered within the state."

Upon the principle of comity the legislature of this state enacted § 6419, Bal. Code, which provides as follows:

"When the guardian and ward are both nonresidents, and the ward is entitled to property in this state, which may be removed to another state or territory, without conflict to any restriction or limitation thereupon, or impairing the right of the ward thereto, such property may be removed to the state or territory in which such ward may reside, upon the application of the guardian to the judge of the superior court of the county in which the estate of the ward, or the principal part thereof, may be, in the manner following: The guardian so applying must produce a transcript from the records of a court of competent jurisdiction, certified according to the laws of this state, showing his appointment as guardian of the ward in the state or territory in which he and the said ward reside; that he has qualified as such according to the laws thereof, and given bond, with sureties, for the performance of his trust; and must also give thirty days' notice to the resident executor, administrator, guardian, agent, or trustee, if there be such, of the applications. Thereupon, if no objection be made, or if no good cause be shown to the contrary, the judge of the court shall make an order granting such guardian leave to remove the property of said ward to the state or territory in which he or she may reside; which order shall be full and complete authority to said guardian to sue for and receive the same in his own name, for the use and benefit of said ward."

It is argued by respondents that this section does not apply to this case, because there is no tangible property involved here; that at most the property sought in this case is a disputed, unliquidated demand, a mere chose in action. The

statute, however, uses the word "property" in its comprehensive sense, and evidently includes choses in action, because the last part of the section recites that the "order shall be full and complete authority to said guardian to sue for and receive the same in his own name for the use and benefit of said ward." This provision seems to make it clear that choses in action are included within the meaning of the word "property," as well as tangible property. It follows, therefore, that, under the statute, the court had jurisdiction to make the order. We see no good reason why it should be vacated. In fact, we are convinced that the court properly made the order permitting the foreign guardian to maintain the action in this state. If the estate of Benjamin B. Healy is indebted to the estate of the nonresident wards, there ought to be a recovery.

The judgment of the trial court vacating the order is therefore reversed.

DUNBAR, HADLEY, FULLERTON, and CROW, JJ., concur.

[No. 5942. Decided March 20, 1906.]

THE STATE OF WASHINGTON, *on the Relation of the Barber Asphalt Paving Company, Plaintiff, v.* THE CITY OF SEATTLE, *Appellant.*[1]

MUNICIPAL CORPORATIONS — ASSESSMENTS FOR LOCAL IMPROVEMENTS—NOTICE. Where the notice of a special assessment for local improvements limited the assessment to property within 120 feet of the improved streets, as described in the assessment roll, the city council could not, without notice, amend the roll to include all property within 180 feet of the streets.

SAME—PARTIAL VALIDITY. Such an assessment is valid as to the 120 feet first described, that part not being affected by proceedings as to another part; but it is void as to the 60 feet added by amendment, since it is essential that notice be given of the intention to assess such strip at that stage of the proceedings.

[1]Reported in 85 Pac. 11.

SAME—VOID ASSESSMENT—POWER TO REASSESS. The power of the city to levy a valid assessment for a local improvement is not exhausted by the levy of a void or ineffective assessment, and in such case the right to reassess is not dependent upon a judgment of a court declaring the first assessment void.

SAME—PARTIES BOUND—CONTRACTOR. A contractor is not a party to proceedings to assess property owners for a local improvement, nor entitled to appeal from an order therein; hence he is not estopped to question the validity of the proceedings by failing to object or appeal.

SAME—MANDAMUS TO COMPEL ASSESSMENT. Mandamus to compel the city to levy a local assessment is the proper remedy for the contractor to pursue where the city has made a void assessment and refuses to correct the same, since it is the only complete and adequate remedy.

Appeal from an order of the superior court for King county, Frater, J., entered September 30, 1905, after a hearing on the merits, granting a writ of mandate to compel a city to make a reassessment for a local improvement. Reversed in part.

Scott Calhoun, for appellant.

Peters & Powell, for respondent.

FULLERTON, J.—The city of Seattle, acting under its powers as a city of the first class, caused one of its principal streets (Howard avenue), together with certain connecting streets, to be graded, paved with asphalt, and otherwise improved; declaring, in the preliminary resolution, that it was its intention to assess the costs thereof to the property specially benefited by the improvement. The plan adopted was that prescribed by the act of March 14, 1899, which provides that bonds may be issued to pay the cost of a street improvement redeemable out of a fund created by a special assessment on the property benefited, payable in installments running over a period not exceeding ten years. Laws 1899, p. 234.

The contract for doing the work was let to the relator, who agreed to take bonds in payment of the contract price to the amount of any balance that might remain due after the owners

of the property assessed (who might desire to do so) had redeemed their property from the lien of the assessment. Thereafter the work was completed to the satisfaction of the city; whereupon it made an assessment upon the property benefited, gave an opporunity to the property owner to redeem, and after the time for redemption had expired, issued bonds to an amount equal to the difference between the contract price and the amounts paid in by the redemptioners. These bonds the city tendered to the relator, who refused to accept them, contending that the assessment out of which they were to be paid was made without notice to certain of the property owners, and was for that reason illegal and void. The relator thereupon requested that the city make a new assessment of the property benefited, which the city refused to do. It then applied to the superior court of King county for a writ of mandate compelling the assessment to be made. After a hearing this application was granted, and a peremptory writ issued. From the order directing the writ to issue, the city prosecutes this appeal.

The assessment roll, as prepared and filed by the board of public works, was made to include property back from the marginal lines of the improved streets for a distance of 120 feet only. On the filing of this roll, the following notice was given:

"Notice of Assessment Roll.

"Notice is hereby given that the assessment roll of local improvement district No. 902, for the improvement of Harvard Avenue and Harvard Avenue North, from East Roy street to Broadway; Boylston Avenue North from East Roy St. to East John St.; Boylston Ave. from East Denny Way to East Union St.; Belmont Ave. North from East Roy St. to East Denny Way; East Mercer St., East Republican St., East Harrison St., East Thomas St., East John St., East Denny Way, all from the west line of Belmont Avenue North to the West line of North Broadway; East Howell street, East Olive St., East Pine St. and East Pike St., all from the west line of Boylston Ave. to the west line of Broadway; East Union St. from the east line of Bellevue Ave. to the

west line of Broadway; Seneca St. and Spring St. from the east line of Boylston Ave. to Harvard Avenue, all in the city of Seattle, by paving the same with asphalt, etc., under ordinance No. 10710 has been reported by the board of public works to the City Council of the city of Seattle, and is now on file in the office of the city comptroller, and ex-officio city clerk, and that the same is now open for public inspection at said office and will remain open for inspection until Monday, the 22nd day of August, 1904, at 5 o'clock p. m., and all persons interested, are hereby requested to appear before the city council at a session thereof to be held in the council chamber in the city hall on said 22nd day of August, 1904, at 8 o'clock p. m., and make objections thereto. At said time so fixed, the city council will consider any and all objections made, and will make such corrections in said roll as it deems just, and will then, by ordinance approve such roll and levy and assess the amounts thereof against each parcel and lot of land and part thereof shown in said roll, and declare the same a first lien thereon. Said matter may be adjourned to a later date if so ordered, by the city council. John Riplinger, city comptroller and ex-officio city clerk."

At the hearing held pursuant to the notice, the city council, without any further notice, amended the roll so as to make it include all property back from the improved streets for a distance of 180 feet, and passed an ordinance levying an assessment upon the property included within the roll as so amended. It is the relator's contention that the property included in this outer rim of sixty feet has been assessed without notice to its owners, and that this fact renders the whole assessment void. The city disputes both the fact and the conclusion drawn from the fact, and these conflicting contentions constitute the principal questions to be considered.

As to the fact, it seems to us that there can be but little question that this outer rim was assessed without notice to its owners. The assessment roll as made out and filed by the board of public works did not include any part of it, and it was to this roll that the attention of the owners was directed by the published notice. This notice, it will be ob-

served, specially recites that the city will assess the amount expended on the improvement of the street "against each parcel and lot of land shown in said roll, and declare the same a first lien thereon." If this means anything at all, it means that the property included within the roll, and that property only, will be assessed to create the necessary fund, and that the property holder need look no further than the roll to ascertain whether his property is liable to assessment. Any property holder owning property in the vicinity of the improved street was entitled to examine the roll, and if he did not find his property described therein, to go away with the assurance that his property was not to be assessed. If this be not the meaning of the notice, then it is misleading, and worthless as notice because misleading.

Whether the omission to give the notice renders the assessment void, is a more serious question. It is conceded that it is necessary to the validity of every law prescribing a method for imposing a special assessment upon real property that it provide for notice to the owner of the property, and afford him an opportunity to be heard concerning the correctness of the assessment, at some stage of the proceeding, before the assessment becomes absolute or his property is taken to satisfy the lien of the same. But it is said that only one notice is necessary, and that this notice may be given at any stage of the proceedings; and since there can be no foreclosure of the assessment lien in this instance without a further notice to the property holder, the requirements of the law are satisfied, and the assessment, though it may be voidable, is not void. It is held, however, and it seems to be the general rule, that to render the assessment valid, even when made under a constitutional law, it is essential that the notice be given at that stage of the proceedings the law directs that it be given, and if more than one is provided for, more than one must be given. *Wilson v. Seattle,* 2 Wash. 543, 27 Pac. 474; *Buckley v. Tacoma,* 9 Wash. 253, 37 Pac. 441; *Haisch v. Seattle,* 10 Wash. 435, 38 Pac. 1131; *Stuart v. Palmer,* 74 N. Y.

183, 30 Am. Rep. 289; *Garvin v. Daussman,* 114 Ind. 429, 16 N. E. 826, 5 Am. St. 637, *Davidson v. New Orleans,* 96 U. S. 97, 24 L. Ed. 616; 25 Am. & Eng. Ency. Law, 1215, and cases cited. This being the rule, the assessment on this outer 60 feet is void; for both the statute and ordinance under which the city proceeded provide for notice to the property holder at that stage of the proceedings between the time of the filing of the assessment roll by the board of public works and the time of its confirmation by the city council.

As to the property within the 120 foot limit, we think the assessment valid. The only objection urged against it is that the assessment cannot be valid as to part of the property, and invalid as to the remainder; that there is such an interdependent relation between the several parts that one part cannot be void without the whole being void. We cannot think, however, that these objections are sound. In an assessment based upon benefits, where each individual tract is assessed only its proportionate part of the whole, the owner of a tract justly assessed has no valid ground of complaint because his neighbor has been unjustly assessed. If he has been taxed in a lawful manner for his just proportion originally, his assessment does not become unlawful or unjust because of the fact that the assessment proves invalid as to another tract, and he cannot be heard to complain of anything except unlawful or unjust exactions. Moreover, the uncomplaining owners of the tracts lawfully assessed have rights in the matter that ought not to be thus ignored. They should not be required, without just cause, to appear and contest anew the proportional share of the entire charge their property should bear, nor should their property be subjected to the additional costs of a reassessment where the original assessment is just. These proceedings, furthermore, while pending, affect injuriously the right a person has to deal with his property, as it renders it impossible for him to make as favorable contracts concerning it as he can do when his rights therein are fixed. He ought not, therefore, to be subjected to the loss and annoy-

ance of a reassessment unless the absolute necessities of the case require it.

It seems to us, also, that a proper construction of the statute requires the holding that the assessment is to be declared void only so far as the necessities require. The statute provides that a property holder who has had notice and an opportunity to contest the validity and correctness of the assessment, if dissatisfied with the order made by the city council, must appeal therefrom to the courts within a given time, or else be forever barred from questioning the regularity, validity or correctness of the assessment. It further provides that, if an appeal from the order is taken, and the court finds the objection well taken, it shall correct, modify or annul the assessment only in so far as it affects the property of the appellant, but that the action of the council in confirming the assessment shall be conclusive in all things upon all parties not appealing. If this statute is to be given effect, it must necessarily be held that an adjudication that the assessment is void as to one tract does not invalidate the entire assessment.

The case of *Young v. Tacoma,* 31 Wash. 153, 71 Pac. 742, and kindred cases cited, are not contrary to the principle here announced. The court there had in review assessments made under a statute that did not contain the provision cited. They were cases, also, where the assessment was declared void for fundamental errors which affected the entire assessment, and were decided on a principle that would prevent the enforcement of the assessment against any of the property included within the roll. Here the error affects only a part of the property, and no reasons exist for declaring the assessment void for anything more than the affected part. We conclude, therefore, that the assessment is invalid as to that property included within the so-called outer rim of sixty feet, but valid as to all of the remainder of the property.

These considerations determine the principal questions suggested by the record, but the city insists upon some minor

questions that must be noticed. It contends, first, that the city exhausted its powers when it made the original assessment, and cannot now make a reassessment except by virtue of the act of 1893; and under that statute it cannot make a reassessment until the first assessment has been declared void by the judgment of a court, and here there has been no such judgment. But the city has power, by its charter and the general statutes and ordinances under which it originally proceeded, to make a valid assessment of property benefited to pay for a street improvement, and this power is not exhausted by any irregular, voidable, or void, attempt at its exercise. In other words, its power to make a valid assessment does not depend on the statute of 1893. It has that power from the laws granting the power to make an assessment, and no number of voidable or void attempts at its exercise destroys the power. True, the statute of 1893 is the only one operative in a certain class of cases; for example, where lapse of time, or fundamental defects in the original law, prevent a valid assessment under such original law, but it was not intended to cut off, and does not cut off, the right of a city to make a valid assessment where no other objection intervenes save the one that the city has already made an invalid or voidable attempt at an assessment. Laws 1893, p. 226.

It is next said that the contractor was a party in interest in this assessment, and inasmuch as he made no objection to it while it was in progress, and took no appeal from the final order, he is now estopped to question its validity. But the contractor was not a party in the sense that the proceedings in any way bound it. Under its contract the city was obligated to pay it in bonds payable out of a fund legally created. The creation of that fund was wholly the duty of the city. If the city did not legally create the fund, the contractor was not obligated to take the bonds, and the contractor's first right to object to the proceeding arose when the bonds were tendered it. It could not intervene legally in

the assessment proceedings; the most it could do would be to offer friendly suggestions which the city could heed or ignore as it chose. Having no legal right to intervene in the proceedings, it had, of course, no legal right to appeal therefrom, and cannot be estopped because it did not resort to an appeal. There is nothing in the case of *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197, that is contrary to this view. There the person held estopped was the owner of the city's obligations, and the proceedings which he afterwards sought to ignore as not binding upon him were instigated for his benefit, not in pursuance of any contract obligation. He was a party to the proceedings in every sense, and as he did not appeal was estopped to afterwards question their validity.

Lastly it is said that mandamus is not the proper remedy, but we think it is, on the principle that it affords the only complete and adequate remedy. *State ex rel. Brown v. McQuade*, 36 Wash. 579, 79 Pac. 207, and the other cases from this court there cited.

The order appealed from is reversed, and the cause remanded with instructions to enter an order directing the appellant to reassess that part of the assessment district outside of the 120 foot limit, for the amount heretofore apportioned to such part; namely, $2,222.29, and the accrued interest thereon. Neither party will recover costs on this appeal.

MOUNT, C. J., HADLEY, CROW, and DUNBAR, JJ., concur.

[No. 5954. Decided March 20, 1906.]

SPRING HILL IRRIGATION COMPANY, *Appellant*, v. LAKE IRRIGATION COMPANY *et al.*, *Respondents*.[1]

APPEAL—RECORD—SUPPLEMENTAL RECORD. Failure of the record on appeal to show service of the notice of appeal may be cured by the filing of a supplemental record showing the service.

JUDGMENT — RES JUDICATA — ISSUES DETERMINED — RIGHT TO USE WATERS OF STREAM. A judgment establishing the plaintiff's right to use the waters of a stream by priority of appropriation is *res judicata* and a bar to an action by the defendant to recover the water by right of prescriptive use for more than ten years, where the complaint in the former action alleged generally title in fee simple, demanding that defendant set up his title, if any, and the answer of the defendant raised only the issue of prior appropriation; especially where the prescriptive use claimed in the second action was coincident with the appropriation claimed in the former action.

SAME—APPEAL—DECISION—REMAND. Remanding a case on appeal with directions to determine the priority of rights of respective claimants to the waters of a stream does not confine the inquiry to the matter of appropriation, or exclude rights by prescription.

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered July 15, 1905, in favor of the defendants, dismissing an action to determine the right to the waters of a stream, upon sustaining a demurrer to the plaintiff's reply to the answer. Affirmed.

C. Victor Martin, for appellant.

W. O. Parr, Kirk Whited, and *John D. Dill*, for respondents.

HADLEY, J.—In this action the plaintiff claims to be the owner of the right to use all the water flowing in the two northwest branches of Stemilt creek, a perennial stream, situated in Chelan county, this state. The right is alleged to have been prescriptively acquired, and the complaint states that the plaintiff and its grantors have diverted, appropriated

[1]Reported in 85 Pac. 6.

and used the water continuously, uninterruptedly, and adversely, claiming to be the absolute owners of such right, for more than ten years. It is alleged that the defendants claim a right to interfere with plaintiff's use of said water, and that since the year 1902 they have interfered therewith. The complaint asks that plaintiff shall be adjudged to be the owner of the right to divert and use the water, that the defendants shall be adjudged to have no rights or beneficial interest therein, and that they shall be perpetually enjoined from in any way interfering with plaintiff's use of all of said water.

Separate answers were filed by defendants, denying generally the material allegations of the complaint, and pleading affirmatively as a bar a former adjudication of the same matters which plaintiff seeks to have adjudicated in this action. The former action set up in the answers is *Miller v. Lake Irrigation Co.*, which was twice in this court, and is reported in 27 Wash. 447, 67 Pac. 996, and in 33 Wash. 132, 74 Pac. 61. The record of the former action is properly set up, and shows that the parties to this action, or their predecessors in interest, were parties to the former one; that the former action was brought for the purpose of determining the prior rights between the parties as to the waters of Stemilt creek, and that issues were joined and the rights of the parties adjudicated and determined in that action.

The plaintiff replied to the answers and admitted the former action, but alleged that the only adjudication in that action was with reference to priorities of appropriation, and that the issues in the present case are not the same as those in the former case. The defendants demurred to the reply, and among other grounds set forth in the demurrers, it was stated that the reply showed affirmatively that the plaintiff's rights in said waters were fully determined in the former action. The demurrers were sustained, and the plaintiff having refused to plead further, judgment was entered dismissing the action. The plaintiff has appealed.

Respondents have interposed several motions, but as most of them pertain to the arrangement of the record and appellant's brief, and relate chiefly to the convenience of this court, we have decided to pass them without criticism of the record and without discussion. The point raised by one motion, that the record shows no service of the appeal notice, has been met by a supplemental record brought up by appellant, which shows such service. The motions are therefore denied.

It is argued by appellant that the issues in the former action related solely to priorities arising out of appropriation, whereas it is urged that the complaint in the case at bar tenders an entirely different and distinct issue, relating exclusively to rights acquired by prescription or adverse user. It is conceded that appellant might have raised the issue as to its prescriptive rights in the former action, if it had seen fit to do so; but it is argued that it was not required to do so, inasmuch as it was a defendant in that action and was only required to meet the issue of prior appropriation, which it is contended was the only one tendered by the complaint. The doctrine is invoked that not all things which might have been adjudicated in a former action shall necessarily be held to have been adjudicated, but only such as were in fact adjudicated. As a rule of general application the courts, without doubt, are lately inclined to adopt the above by way of modification of the rule which more generally obtained formerly, that what might have been adjudicated should be held to have been determined in a former action. While the former rule has been much relaxed as one of general application, yet in considering the effect of a former case upon subsequent litigation between the same parties, the peculiar nature of such case, the subject-matter thereof, and the manner by which the complaint challenged the defendant to join issue, should in each instance be examined.

In the former case which is pleaded here as a bar the complaint simply alleged that the plaintiffs in that action were

the owners in fee simple, and in possession, of the first right to divert the waters of said creek, to the extent of four hundred inches, miner's measure, under a six-inch pressure; that the defendants claimed some interest in, and title to, said water rights adverse to the plaintiffs, which claims were without right and constituted a cloud upon plaintiffs' title. The action was essentially one to quiet title, and whether it can be said to have related to real estate or not, it at least partook of all the characteristics of an action to quiet title to real estate, and we think was governed by the rules applicable to such cases. The prayer of the complaint asked that the defendants in the action, of whom this appellant was one, should set up their claims in and to the premises, if any they had, and that upon a hearing thereof such claims should be declared to be without foundation and clouds upon plaintiffs' title. The complaint was not upon its face based alone upon prior appropriation, but it merely alleged ownership in fee simple and possession of the first right to divert water. In other words, it alleged a good title to water rights, and it challenged the defendants to set up any claims they had against such rights. In actions to quiet title to real estate, where such general allegations of ownership are made, it is undoubtedly the duty of a defendant to set up any claim he may have of either a legal or equitable nature, and we think by analogy at least that, if appellant desired to litigate the question of a prescriptive right to these waters, it should have done so in the former action, and that it should now be estopped to raise it. Such peculiar circumstances, we think, particularly call for the application of the principles of estoppel. As respondents' counsel pertinently suggest, if appellant may now try this action on the theory of title by prescription, and if it should be defeated, what shall prevent it from again introducing future litigation, claiming title from some other source, all of which may have existed at the time of the former action? Such cannot be the policy of the law, but the policy rather is that such conflicting claims shall

be raised when one is challenged to raise them, so that titles may be at rest and have stability and value.

Upon appellant's own theory, we are unable to see how it can expect relief under the issues as they stand. In the former action it dated its claim of title from the year 1885, and in this action it claims that its prescriptive right was initiated at that time. The record of the former case shows that the rights which were adjudicated to respondents in that action, and which were based upon appropriation, had their inception long within the period following the year 1885 necessary for appellant's prescriptive rights to have matured. The adjudication in the former case therefore shows that appellant could not have been in the continuous, uninterrupted, and adverse possession of the water rights claimed by respondents for a sufficient time to have acquired them by prescription. Respondents are claiming no rights here except what were awarded to them in the former case. They expressly disclaim any further claim to the waters of said stream. The essential question raised by the complaint in this action was therefore necessarily adjudicated in the former one. That decree was necessarily based upon the establishment of facts which negative those alleged in the complaint now before us, as to continuous and uninterrupted possession and user by appellant. Such uninterrupted, continuous, adverse possession and user could not have existed as to the volume of water that was awarded to these respondents, in the face of the adjudication that the latter were using and appropriating it at the same time. No prescriptive right could have matured in behalf of appellant under the facts involved and found in the former case.

Appellant argues that, when the former case was first here on appeal, it was sent back with instructions to the trial court to merely determine priorities of appropriation. While an expression in the opinion would so indicate, yet the order remanding the case stated that the court should "determine

the priority of rights of the respective claimants." If appellant believed it was by that decision prevented from raising the question of its prescriptive right, it should have called our attention to it on petition for rehearing, or it should have applied to the trial court for leave to introduce that defense. This court placed no restrictions upon the trial court in the exercise of its discretion to permit the introduction of what it should deem to be proper issues not already in the case. The case was determined here upon the issues as they were brought here on that appeal. It was plainly appellant's duty to have interposed the defense when it first appeared in the action, but upon the return of the cause to the superior court, that tribunal upon proper showing was not prevented by this court from exercising its discretion to consider and grant an application to amend the answer.

Appellant further contends that, even with the demurrer to the reply sustained, there were issues remaining which called for evidence, and that it was error to dismiss the action. We think not. The ruling upon the demurrer effectively disposed of the case. The reply admitted the former record and as we have seen, that is sufficient to bar relief in this action.

The judgment is affirmed.

MOUNT, C. J., FULLERTON, DUNBAR, CROW, and ROOT, JJ., concur.

[No. 6024. Decided March 20, 1906.]

THOMAS FROMAN, *Respondent*, v. H. E. AYARS *et al.*, *Appellants*.[1]

MALPRACTICE—EVIDENCE OF NEGLECT OF PHYSICIAN—SUFFICIENCY. A verdict in favor of the plaintiff, in an action for malpractice, will not be disturbed on appeal as unsupported by the evidence, where there was much conflict in the testimony as to the correctness of the remedies and methods in attempting to set a compound fracture of the leg, and where it appeared that the wound did not heal, but was, in a short time, in very bad condition, necessitating amputation of the foot.

DAMAGES—EXCESSIVE VERDICT. A verdict for $5,000 damages for the loss of a foot, sustained through the malpractice of a physician, is not excessive, where it appears that the plaintiff, a common laborer, was forty-four years of age, with an expectancy of life of twenty-six years; and such a case is not to be distinguished from the ordinary personal injury case in assessing the amount of the damages.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered June 2, 1905, upon the verdict of a jury for $5,000 damages for malpractice. Affirmed.

Graves & Graves, and *Wright & Wright*, for appellants.

Merritt & Merritt, for respondent.

HADLEY, J.—This is an action to recover damages for alleged malpractice of the defendant H. E. Ayars, as a physician and surgeon. His wife, as a member of the marriage community, is also made a defendant. It is alleged that the plaintiff, while driving on July 7, 1904, was thrown from a vehicle; that he sustained a compound fracture of the bones of his left leg, about two inches above the ankle joint; that the ends of the bones protruded through the flesh and skin; that within a few hours of the accident the defendant, at plaintiff's request, commenced to treat the broken leg and

[1]Reported in 85 Pac. 14.

wound as a physician and surgeon, for hire; that in setting the bones, the defendant did not properly cleanse and prepare the wound made by the protrusion of the bones, but left foreign substances in and about the wound which should have been removed; that he caused the leg to be placed in a wooden box and fastened to the sides thereof by means of cord or bandages; that he placed a cord bandage around plaintiff's left foot, just back of the toes, and drew the cord down over the end of the box, where it was securely fastened, and that this caused the foot to be extended into an unnatural position making the heel to rest heavily upon the bottom of the box; that soon after plaintiff suffered much pain; that the heel became sore and was injured, and that the leg was left in that condition from the seventh until the tenth of July, when it was taken from the box and placed in a plaster of Paris cast; that it remained in the plaster of Paris cast until July 17, when it was removed therefrom and again placed in the box and securely bandaged and fastened; that by means of adhesive plaster or cords attached to the left foot, just back of the toes and extending downward over the iron rods of the bed, defendant caused a weight of about eighteen pounds to be suspended; that the bandages and weight were so adjusted that the foot was drawn to an unnatural and improper position, the toes being drawn and extended far beyond the natural position, and the heel being drawn and held too solidly against the bottom of the box; that the leg remained in that position until July 18, with the weight so suspended, during which time plaintiff suffered great agony and pain, both with the wound of the leg and by reason of the condition in which the heel was held against the bottom of the box; that by reason of defendant's failure to properly cleanse and prepare the wound, the same within a few days after the injury became inflamed, pus formed therein, and the flesh in and around the wound began to decay; that for the same reason the ends of the bones became deadened and began to decay, and that this condition had so progressed that, on the

18th of July, the ends of the bones both above and below the fracture extended to the distance of about one-half inch, and the flesh had so decayed that it was practically in an incurable condition; that at the time the leg was placed in the box and the weight attached thereto, the defendant packed bran around the leg in such a manner that the bran was permitted to accumulate in and about the wound; that by reason of defendant's failure to exercise reasonable care and diligence in the treatment of said wound and fracture, and by reason of his failure to exercise his skill and to apply his learning to accomplish the proper treatment, the aforesaid condition was produced, and that the same made necessary the amputation of the leg, which was effected on July 20, 1904, at the Sacred Heart Hospital in Spokane, by Doctors Setters and Thomas. Issue was joined, and the cause was tried before a jury, resulting in a verdict for the plaintiff. Judgment was entered upon the verdict, and the defendant, having been denied a new trial, has appealed.

The first error assigned is that there was not sufficient evidence to warrant any verdict and judgment against appellant. As is usual in such cases, there was much conflict in the testimony of the physicians and surgeons who were examined as expert witnesses. Differing views were expressed as to the propriety of using the "fracture box" and suspended weight in such a case. There was general concurrence of view as to the necessity of applying antiseptic remedies and methods in the treatment of the wound from the beginning. But the testimony was not in accord as to the correctness of the remedies and methods applied in this case. There was testimony in support of the more material allegations of the complaint. While it should not be said that all the averments hereinbefore set forth were sustained by testimony, yet the more material ones were. We think, without doubt, from the evidence, that at the time respondent was removed to the hospital at Spokane, the condition of the wound and bones was

very serious. Witnesses testified that the appellant said, even at that time, that the patient was doing well. Dr. Setters, however, testified that, when the respondent came under his treatment at the hospital, he found the wound very septic, and that it was filled with pus and bran; that the limb was in a fracture box filled with bran, and that there was a cloth across the opening of the wound about four by six inches in dimensions; that the end of the tibia was protruding through the wound, the flesh of the wound being dead, covered with a necrotic membrane, and very foul; that amputation was then necessary, and that the same was accomplished. Whether such a result was due to the treatment administered by appellant and to his neglect to apply his learning and skill in the premises was, under the evidence, for the jury. In view of the character of the evidence that was before the jury, it is neither for the trial court nor for this court to weigh it and say that it does not support a verdict for the respondent.

It is next urged that the amount of the verdict is excessive, and that it is manifest that the jurors were swayed by passion or prejudice. The amount is $5,000. Appellant's counsel make an interesting argument to the effect that this case should be distinguished from one which is brought to recover for ordinary personal injuries where the injury is wholly due to the neglect of the defendant in the case. It is argued that in the case at bar the primary cause of the result which came to respondent was the running away of the team, for which appellant was in no way responsible, and that the degree of appellant's responsible relation to the final outcome cannot be as great as that of one whose negligence laid the first foundation for the injury. The theory of the case, however, is that the final outcome to respondent, by which he was deprived of a foot for the remainder of his life, would not have resulted if appellant had properly applied his learning and skill. It is true, respondent would have suffered pain and distress from the original injury, yet if the bones had properly united and the wound had healed, the suffering

would have been but temporary, while as it is he must continue to suffer humiliation, inconvenience and loss of earning power during the remainder of his life. If such a result would not have occurred but for appellant's neglect, we are not impressed that there is force in the logic of counsel's argument. Appellant held himself out as sufficiently skilled and learned to reasonably and properly treat respondent's injury, and having undertaken to do so for a compensation, the duty was placed upon him to bring to bear upon such treatment the reasonable and ordinary skill and care recognized by the members of his profession in general, as proper and necessary in such a case. He was neither required to exercise the highest degree of skill nor the highest degree of care, but only such as are recognized as ordinary and reasonable by the standards of his profession. The issue was made before the jury that he did not do this, and that his failure in that regard was the responsible cause of the final and serious result to respondent. Respondent was forty-four years of age at the time of the trial, and it was admitted that his life expectancy at the time of his injury was twenty-six years. He had no settled occupation, but had before been variously employed at farming, in the livery business, and as a driver of teams. The value of his earning power should probably be viewed from the standpoint of a common laborer; but viewed from that standpoint, we think we should not undertake to say that the verdict was excessive. To pass through twenty-six years of life without a foot is a condition that we may assume no man, however humble his occupation, would be willing to accept for $5,000. There is seldom a case of this kind, or even one for ordinary personal injuries, when there does not seem to be some element of hardship either way the case may be decided; but such cases are triable by a jury, and when so tried, if there is reasonable evidence to support the verdict, it should not be reduced unless it is manifestly too large, when all the facts and cir-

cumstances are considered. We cannot say that such is true of this one.

No errors are assigned upon the introduction of evidence, the instructions of the court, or other matters occurring at the trial. The judgment is therefore affirmed.

MOUNT, C. J., FULLERTON, CROW, and DUNBAR, JJ., concur.

[No. 6037. Decided March 20, 1906.]

SEATTLE WHARF COMPANY, *Appellant*, v. S. A. CALLVERT *et al., Board of State Land Commissioners, et al., Respondents.*[1]

STATE LAND COMMISSIONER—CANCELLATION OF TIDE LAND LEASE—INJUNCTION—ADEQUATE REMEDY BY APPEAL. An appeal by a lessee lies to the superior court from an order of the state board of land commissioners, cancelling a state lease of tide lands, under Laws 1901, p. 98, giving such right to an "applicant" for a lease, or to any person deeming himself aggrieved by any order affecting his rights or interests in such lease; and there being an adequate remedy at law, a court of equity will not grant such relief by an injunction.

Appeal from a judgment of the superior court for King county, Honorable George Meade Emory, Judge *pro tempore*, entered September 16, 1905, upon findings in favor of the plaintiff, after a trial on the merits, dismissing an action to enjoin the enforcement of an order of the state land commissioner, cancelling a tide land lease. Affirmed.

Geo. McKay, for appellant.

George F. Vanderveer and *James A. Haight*, for respondents.

DUNBAR, J.—This action was instituted to enjoin the enforcement of an order made by the board of state land commissioners, cancelling the plaintiff's lease of the harbor area

[1]Reported in 85 Pac. 16.

in front of tide land lot 167, in the city of Seattle. The lease had been issued in the ordinary form, and in the regular way, and complaint had been made by the owners of the adjacent tide lands that the lessee did not improve. After various hearings, the order cancelling the lease was made.

It is contended by the respondents that the court did not have jurisdiction to enjoin the enforcement of the order cancelling the appellant's lease, for the reason that the appellant's remedy was by appeal from the order made by the board. The legislature, by an act approved March 8, 1901, provided for appeals from the board of state land commissioners. Section 1 of said act, found on page 98 of the Laws of 1901, is as follows:

"Any person who is an applicant to purchase or lease any of the state's granted, tide, shore, arid or oyster lands or harbor areas, or to purchase any timber, stone, fallen timber, hay, gravel or other valuable materials situate on any of the public lands of the state, and any person whose property rights or interests will be affected by such sale or lease, who may deem himself aggrieved by any order or decision of the board of state land commissioners concerning the same, shall have the right to appeal from such order or decision to the superior court of the state of Washington for the county in which such lands, harbor areas or materials are situate. . . ."

The subsequent sections provide the manner of appealing, and for an appeal from the superior court to the supreme court. It is contended by the appellant that the right of appeal in this act is limited to an applicant for a lease, but it seems to us that this is too narrow a construction to place upon the act, and that it was the evident intention of the legislature to give the right of appeal from the orders of the board of state land commissioners concerning the character of property mentioned in the act. Even putting the narrow construction upon the act which is claimed by the appellant, the appellant in this case is an applicant to lease. Notwithstanding the fact that the lease had been executed when the controversy arose as to whether the lease should be revoked

in such a proceeding, it stood in the position of an applicant for the lease.

But the statute provides further that any person whose property rights or interests will be affected by such sale or lease, or who may deem himself aggrieved by any order or decision of the board of state land commissioners concerning the same, shall have the right to appeal. Most assuredly the property rights and interests of this appellant were affected by this lease; and that it deemed itself aggrieved by the order or decision of the board of state land commissioners concerning the same is evidenced by the fact that it brings this action to enjoin the enforcement of such order. It seems to us too plain for extended discussion that the appellant's case falls squarely within the provisions of the statute, and that the right to appeal was thereby conferred upon it. This being true, under the general rule, a court of equity will not assume jurisdiction to grant relief by the extraordinary remedy of injunction where there is an adequate remedy at law, and there is no attempt in this case to show that the remedy by appeal would not have been adequate, the whole contention of the appellant being that the remedy by appeal was not open to it. Finding that it was, and that it did not avail itself of such remedy, it is precluded from proceeding in this action.

In this connection it may not be inappropriate to say that we announce the rule of practice without regret in this particular case, for the reason that, notwithstanding our views on the question just discussed, we have examined the case on its merits and are satisfied that the court acted well within its discretion in making the order complained of.

The judgment is affirmed.

HADLEY, FULLERTON, CROW, and ROOT, JJ., concur.

[No. 5892. Decided March 20, 1906.]

MARY O'BRIEN *et al., Respondents,* v. JOHN H. ALLEN *et al., Appellants.*[1]

JUDGMENT—RES JUDICATA—ACTION TO SET ASIDE A DEED—ISSUES DETERMINED. In an action to set aside a deed, made in fraud of creditors, and to subject the land to the lien of a certain judgment, a decree adjudging the deed void and subjecting the land described to the lien of such judgment merely describing the same for identification as being between certain parties for the sum of $1,327, and costs, is not *res judicata* of the amount due upon such judgment, when it appears that the question as to the amount due was not within the issues in such action, although one of the findings of fact, as signed, was to the effect that $200 had been paid on the judgment since its rendition, and by another finding it was found that $1,327 and costs were due; it further appearing that interlineations and erasures had been made in the findings, and the judgment creditor not disputing in his testimony that in fact $200 had been paid, and not credited.

EXECUTION—ISSUANCE AFTER PAYMENT OF JUDGMENT—SALE—TITLE OF PURCHASER. A judgment creditor purchasing at a sale under an alias execution issued after the judgment was fully paid acquires no title.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated on the admission in evidence of original papers and files in certain actions, instead of certified copies, in that it would cast the additional burden upon appellants of substituting certified copies to be attached to a statement of facts, when by stipulation the originals were attached to the statement of facts, thereby obviating such additional expense.

ACTIONS — STIPULATION FOR COMPROMISE — DEFAULT — FURTHER PROSECUTION OF ACTION—TENDER. A stipulation in a pending action arranging a settlement thereof by the giving of certain notes, the action to be dismissed upon final payment, does not preclude the prosecution of the action upon default in payment of any of the notes, where the stipulation provided that the trial should proceed if any of the notes should not be paid when due, and that in such case neither party could make any use of any provisions of the stipulation; and a tender of the unpaid notes before the trial, without repayment of the notes paid under the stipulation, is all that could be required.

1Reported in 85 Pac. 8.

Appeal from a judgment of the superior court for King county, Bell, J., entered January 7, 1905, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Jay C. Allen, for appellants.

G. M. Emory, for respondents.

Crow, J.—On January 8, 1895, John H. Allen, appellant herein, recovered a personal judgment in the superior court of King county, in cause No. 19171, against Joseph McCabe and Terence O'Brien, for $1,202 debt, $120.20 attorney's fee, and $23.80 costs. On January 7, 1895, Terence O'Brien and Ellen O'Brien, his wife, had conveyed to one James Manogue certain real estate in King county, including the real estate in dispute in this action. Thereafter said Allen, having issued an execution on his judgment, which was returned unsatisfied, commenced an action No. 19517, in the superior court of King county, to set aside said deed as having been made to hinder and delay the collection of his judgment. On October 10, 1895, findings of fact were made in said cause, upon which a decree was entered, adjudging said deed to be void as to said John H. Allen, and subjecting the property therein described to the lien of his judgment, which is described by the decree in the following language:

"That certain judgment heretofore on the 8th day of January, 1895, rendered in the above court in favor of the plaintiff John H. Allen against the defendant Terence O'Brien and one Joseph McCabe, for the sum of thirteen hundred and twenty-seven and 20-100 dollars, together with the costs of said action taxed at twenty-three and 80-100 dollars."

No other language is used in said decree to describe said judgment or to adjudicate the amount remaining due thereon. Defendants O'Brien and wife and James Manogue, claiming said original judgment was for a debt on which McCabe was principal and O'Brien surety, afterwards filed a petition in

said cause No. 19517, to modify the findings and decree therein, for the purpose of showing that the real estate conveyed to Manogue was the community property of O'Brien and wife, and not subject to the lien of said judgment. By this petition, which was denied, no question was raised as to the amount remaining due on said judgment. Afterwards John H. Allen issued an *alias* execution in cause No. 19171, and levied upon the real estate which had been subjected to his lien. All of said real estate was sold on January 10, 1896, to said John H. Allen, for the total sum of $1,310, the tracts involved in this suit selling separately for $110. The entries on the execution docket show that, after crediting said $1,310, proceeds of this sale, there remained on January 10, 1896, an unsatisfied deficiency judgment for $123.25, and no other payments appear on the execution docket. In January, 1897, James Manogue redeemed from said sheriff's sale the land in dispute herein, although John H. Allen denied his right to redeem and made a futile attempt to prevent the same by applying for a writ of mandate to compel the sheriff to execute and deliver a deed to him. The redemption money was received and appropriated by Allen, who afterwards procured a second *alias* execution to be issued on the deficiency judgment shown on the execution docket, and caused the sheriff to again sell the land which Manogue had redeemed. At this second sale Allen again purchased said real estate for the exact amount necessary to satisfy the second *alias* execution, and now claims title.

It is here claimed by respondents that early in May, 1895, O'Brien and McCabe paid to Allen on said judgment the sum of $300, which he neither credited nor caused to be entered upon the execution docket. Said payment, if made, was more than sufficient to have satisfied the deficiency judgment long before the second *alias* execution was issued. James Manogue died testate on January 14, 1897, leaving the respondents Francis Henry Manogue, Mary Manogue, and Eva

Marie Manogue, his minor children, as his only heirs at law and legatees. Respondent Mary O'Brien was shortly thereafter appointed executrix of his last will and testament, and later was appointed guardian of his minor heirs. On April 11, 1898, the respondents, Mary O'Brien, as executrix of the last will and testament of James Manogue, deceased, and Francis Henry Manogue, Mary Manogue, and Eva Marie Manogue, by their guardian Mary O'Brien, instituted this action to quiet the title of the estate of James Manogue to the real estate which had been sold under said second *alias* execution. Respondents alleged that, after the entry of said original judgment in cause No. 19171, a payment of $200 was made on January 23, 1895, and a further payment of $100 on May 23, 1895, by said McCabe and O'Brien to said John H. Allen, which said Allen had received but neglected to have credited on the execution docket; that said first sheriff's sale was made January 10, 1896; that by such sale and the cash payments of $300, said judgment was more than fully satisfied; that after said Manogue had redeemed from said first sale, the said Allen caused said second *alias* execution to issue upon an apparent deficiency judgment shown by the execution docket, under which he again purchased said land, and now claims title; and that at the time of the commencement of this action said land was in the actual possession of no person whomsoever. Respondents prayed that their title might be quieted, and asked for other relief.

On May 23, 1900, and before any answer was filed, a written stipulation was entered into between respondents and appellants herein, which in substance provided, that this cause was compromised and settled upon condition that the appellants John H. Allen and Lucy A. Allen, his wife, should pay the respondents $400 in three months, $400 in six months, $400 in nine months, said sums to be evidenced by their promissory notes; that this cause should be stricken from the trial calendar, and in case said promissory notes were severally paid at maturity, the appellants should be en-

titled to a decree of dismissal without costs to either party; but in event of nonpayment of any of said notes, respondents might proceed with said cause as though the stipulation had never been made; that any admissions made in said stipulation or which might be inferred thereby should not be used upon any trial of this cause against either party. Only one of said notes was paid. Thereafter on April 4, 1904, no further payments being made, respondents noted this cause for further proceedings, and appellants thereupon answered, alleging that after the entry of the original judgment in said cause No. 19171, O'Brien and wife executed said deed to Manogue; that appellants instituted said cause No. 19517 to set the same aside; that on the trial thereof the court found the sum of $200 had been paid on said original judgment after its rendition, and further found the amount due thereon to be $1,327,20, and $23.80 costs; that thereafter the court by its decree in said cause No. 19517 directed said real estate to be subjected to appellants' lien for said amount; that O'Brien and wife and Manogue thereafter filed their petition to modify said judgment, which petition was denied, and that the amount of said judgment as found was not questioned in said petition, but had become *res adjudicata*. Appellants also pleaded the stipulation herein above mentioned, the delivery of three notes for $400 each to respondents, the payment of one note in full, and alleged that respondents had neither returned nor tendered to appellants the two notes which were unpaid and in default, and that by reason thereof they should be estopped from proceeding with this action.

The trial court made findings in favor of respondents, and refused those requested by appellants. From findings made it appeared that on January 28, 1895, Terence O'Brien paid to said John H. Allen the sum of $200, and on May 23, 1895, the further sum of $100 on account of said judgment, neither of which payments was credited on the records in said cause No. 19171. It was also found that, after said redemption had been made by said Manogue, and while said John H. Allen

still retained said payments aggregating $300, and after said judgment had been fully paid, he procured said second *alias* execution to be issued, and caused said lands to be sold; that he purchased the same for the sum of $155.05, and received a certificate of sale, and that he has ever since refused to recognize the rights of respondents as successors in interest to said James Manogue. It was further found that, at the time of the commencement of this action, a notice of its pendency was filed in the office of the county auditor, and that the lands in dispute were then vacant, unoccupied and not in the possession of any person. Final judgment was entered in favor of the respondents, quieting their title, and this appeal has been taken.

Appellants first contend that the court erred in finding that any cash payments had been made on said judgment, and that by reason thereof said judgment had been fully satisfied before the issuance of the second *alias execution*. In support of this contention, appellants rely upon their plea of *res adjudicata*. They insist that the findings of fact and final decree in said cause No. 19517, which was brought to set aside said deed, constituted a final adjudication to the effect that the sum then remaining due on said judgment was $1,327.20, and $23.80 costs, and further contend that no parol evidence should have been admitted in this collateral proceeding to contradict such adjudication. The original findings of fact and decree filed and entered in said cause No. 19517, are now before us as a part of the statement of facts, and present a very peculiar appearance. The findings were evidently prepared and submitted to the trial judge, Honorable J. W. Langley, who appeared as a witness for respondents on the trial of this action. One finding, number three, had been prepared for the purpose of showing that the land was the community property of Terence O'Brien and wife. This finding has been stricken by a heavy waving line, drawn through it in ink. At the close of all the findings, which are typewritten, a few words written in ink are added. Judge

Langley testified that he thought the waving ink line erasing the third finding had been made by him, and testified that the added words and judge's signature were written by him in ink. The eleventh finding as originally drawn reads: "That since the rendition of said judgment there was paid on September 25, 1895, the sum of $200 thereon." Lead pencil marks have been drawn through this finding, striking it, but no ink erasure has been made. Judge Langley testified that he did not think he had made these pencil erasures, nor would he state that he had authorized them. The thirteenth finding as originally drawn read: "There is now due upon said judgment the sum of $——." Afterwards the blank was filled in with ink, so as to read "$1,327.20, and $23.80 costs." Judge Langley said this was not in his handwriting, and the evidence fails to show who did write it. The final decree makes no allusion to said payment of $200, nor, according to our construction, does it purport to adjudicate the amount due upon the original judgment. It simply describes the judgment in the words which we have above quoted in our statement of this case. Terence O'Brien and his attorney both testified that $300 had been paid to appellant Allen on account of the judgment. Several other witnesses stated that Allen, when a witness on the trial of cause No. 19517, admitted $300 had been paid him in cash upon this judgment. In his answer herein he alleges that the trial court in cause No. 19517 found $200 had been paid, and this is shown by the finding which has been erased by pencil. Although he appeared as a witness in his own behalf on the trial of this action, he refrained from giving any testimony whatever tending to show either that these payments had been made or had not been made. He relies entirely upon the record in said cause No. 19517. If there has been an adjudication therein finding the amount remaining due upon said judgment, it is binding upon the parties to this action.

We do not think such an adjudication has been shown, for

several reasons: (1) It was not within the issues in that action, which was not brought to determine the amount due, but only to set aside a deed; (2) although the findings may be somewhat inconsistent, we think, as originally signed by the trial judge, they found $200 had been paid; (3) the decree does not purport to adjudicate the amount due, but describes the original judgment, for the evident and sole purpose of identification. With the record in this condition, it was not error for the trial court to admit parol evidence showing said payments to have been made, there being no adjudication of that question. We hold the trial court was authorized to try this issue of fact, and that its findings that the payments were made are fully warranted by the evidence. This being true, the first sale made by the sheriff, together with such cash payments, fully satisfied the judgment, and at the time the second *alias* execution was issued, appellant had no judgment whatever against O'Brien and McCabe. Hence, he acquired no title under the second sheriff's sale. Freeman, Executions (3d ed.), § 19.

This not being an action to recover possession of real estate, but one to quiet title only, respondents alleged, and the trial court found, that at the time of its commencement said real estate was not in the possession of any person whomsoever. Appellants now contend that the court erred in making this finding and that the evidence warranted a finding, which should have been made, that appellants themselves were in possession and that the property was not vacant or unoccupied, and hence, under the authority of *Povah v. Lee,* 29 Wash. 108, 69 Pac. 639, this action should be dismissed. While there is a considerable conflict of testimony upon this issue, nevertheless we think the evidence before us is amply sufficient to sustain the finding made by the trial judge, who saw and heard the witnesses.

Appellants base a further assignment of error upon the action of the trial court in admitting as evidence certain

original papers and files in said causes No. 19171 and No. 19517. Appellants insist that certified copies should have been offered, as otherwise the party not presenting such evidence would, if compelled to appeal, have to assume the burden and expense of substituting certified copies to be attached to a statement of facts. By a stipulation subsequently made, the original files which were offered and admitted in evidence have been attached to the statement of facts, and transmitted to this court. Appellants, therefore, have incurred no additional trouble or expense, and it is unnecessary for us to pass upon this contention.

Appellants further contend that the written stipulation herein precludes the prosecution of this action. The stipulation provided that, if any of the notes given by appellants should not be paid when due, respondents might proceed with the trial in the same manner as though no stipulation had been made. This is all respondents have done. This action was already pending when the stipulation was made. Hence, the return of the notes could not be a condition precedent to its commencement. The undisputed evidence shows that respondents did tender the unpaid notes to appellants before the trial commenced, which is all that could be required of them; especially as the stipulation provided that neither party should make use of any of its provisions upon the trial. There is no merit in this contention now made by appellants.

We find no prejudicial error in the record. The judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 5736. Decided March 22, 1906.]

DEWITT C. CADY, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—DEFECTS—CONTRIBUTORY NEGLIGENCE OF TRAVELER THROWN FROM A WAGON—QUESTION FOR JURY. The question of the contributory negligence of a traveler by team, who was injured by being thrown from his wagon by the dropping of the front wheels into a hole, two feet deep, at the edge of a pavement at a street intersection, is for the jury, where there was conflicting evidence as to whether the defect was visible from the wagon and could have been avoided by ordinary care.

SAME—SAFER ROUTE. One traveling by wagon in a city street, open for public travel, who was injured by reason of a defect in the street, is not guilty of contributory negligence by reason of the fact that there is another safer way that he might have taken to reach his destination.

SAME—STREETS NOT IMPROVED. It is the duty of the city to keep in ordinary repair a street which, to its knowledge, is in common use, and suffered to remain open, although not formally accepted or improved by the city.

TRIAL—MISCONDUCT OF COUNSEL—PREJUDICE. In an action against a city for personal injuries, a statement to the jury by counsel for the plaintiff that any verdict against the city would be paid largely by nonresident owners of real estate held for speculative purposes, will not require a reversal where the court, on objection, immediately instructed the jury to disregard the same, and where a reversal to punish counsel would be too harsh a remedy.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 6, 1904, upon the verdict of a jury, rendered in favor of the plaintiff in an action for personal injuries sustained in a fall from a wagon by reason of a defect in the street. Affirmed.

Scott Calhoun and *Elmer E. Todd*, for appellant.

Benson, Hall & Higgins, for respondent.

FULLERTON, J.—The respondent was injured by being thrown from his wagon while passing over one of the streets

[1]Reported in 85 Pac. 19.

of the appellant city, and brought this action to recover therefor. The jury returned a verdict in his favor for $3,000, which was reduced by the trial court to $1,500, and judgment for that sum entered.

The evidence was conflicting concerning the condition of the place where the accident occurred at the time of the accident, the city's knowledge of its condition, and on the question whether or not the danger of traveling on the street where the injury occurred was so apparent that a traveler thereon must be held to have assumed the risk; and as the jury found for the respondent, this court must assume as true that part of the evidence most favorable to his contention. This evidence tended to show that the respondent, who was a wood and coal dealer in the city of Seattle, went with one of his drivers on the day of the accident to deliver a load of coal to a customer who lived on Queen Anne hill, in that city. On the return trip his driver started back on one of the principal streets, but finding it blocked lower down, because of repairs that were being made on it, turned west on a paved street called Highland Drive and followed it until he came to Second Avenue West, into which he turned. On leaving the pavement on Highland Drive, the front wheels of the wagon dropped into a hole some two feet deep, which caused the wagon to lurch forward, and throw the respondent from his seat to the ground, occasioning the injuries of which he complains. Second Avenue West had not been graded or otherwise improved by the city at the time of the accident, and at the place where the respondent turned into it, was somewhat steep, although not too steep for safety when in ordinary repair. The hole was caused by the wheels of wagons passing from the hard unyielding pavement to the softer yielding earth of the street, and by the wash from the overflow of the gutters extending along Highland Drive. Neither the respondent nor his driver noticed the hole until they got almost directly over it, too late to turn back or

avoid it. It did not appear that the city had actual knowledge of the condition of the street at the time of the accident, but it was shown that a hole was made at that place by the passage of teams and the action of the water shortly after the pavement was put down on Highland Drive, which was several months prior to the accident, and that it had been refilled with earth and washed out several times between its first appearance and the time of the injury, although no attempt had been made to repair it permanently. It also appeared that by going further around the respondent could have descended the hill and reached his place of business upon graded and paved streets, without risk of accident from defects in the way.

The appellant contends that the respondent was guilty of contributory negligence, both because he ought to have noticed the defect causing the injury, and because there was another way he could have taken without subjecting himself to the chance of injury. There was evidence supporting the contention that the defect was visible from Highland Drive and could have been avoided by the exercise of ordinary care, but there was evidence to the contrary also. In such a case the question is one for the jury, and the court in this case very properly submitted the question to them. As to the other objection, it is not the rule that one must avoid a particular street because there is another and safer one that he may take. One has the right to travel upon any street of a city which the city leaves open for the purposes of travel. If the street is steep or the track rough he must use care commensurate with the conditions, and is guilty of contributory negligence if he fails to use such care, but he may rely on the presumption that there are no hidden defects in the way, or that there is nothing liable to cause him injury or mishap other than such as are plainly visible; in other words, he assumes the risk of the obvious dangers only. According to the evidence of the respondent, the defect causing the injury in

this case was not visible until it was too late to avoid it. The jury were warranted in believing this evidence, and if they did believe it they could not convict the respondent of contributory negligence for suffering himself to be driven into it.

The city next contends that because it had never graded this street or formally opened it for travel it cannot be held liable for injuries caused by its defective condition. But the evidence shows that the street was in one of the principle residence districts of the city, that it had been open for travel for a long time, and had been extensively used to the knowledge of the city's officers. When a street is suffered to remain open by the city, and is in common use by the people, it is the duty of the city to keep it in ordinary repair. This is true whether or not the street has been formally accepted, or is what may be technically called an improved street.

In his address to the jury one of the respondent's counsel used this language: "Whatever verdict you find in this case will be paid largely by taxes levied against the property of nonresidents of the city of Seattle held for speculative purposes, and will not affect, to any considerable extent, the residents of the city." On objection being made, the court "Ordered said remarks stricken from the jury, and directed the jury to ignore the same." It is now contended that the remarks of counsel were prejudicial, that the action of the trial court did not cure their effect, and that the city is entitled to a new trial because of prejudice. But we think any error that was committed was cured by the action of the court. Ordinarily an appellate court feels inclined to reverse a case where an argument such as this is used, not so much because of the prejudice engendered, as to punish counsel for resorting to it. There are in the record, however, certain other matters which make us think this would be too harsh a remedy to apply in this case.

Lastly it is claimed that the verdict, even as modified by the trial court, is excessive. But a careful examination of

the evidence on this point convinces us that the judgment as entered is not so disproportionate to the injury suffered as to require further reduction.

The judgment is affirmed.

MOUNT, C. J., HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5925. Decided March 22, 1906.]

JOSEPHINE A. WOODMAN *et al., Appellants,* v. SEATTLE ELECTRIC COMPANY, *Respondent.*[1]

CARRIERS — NEGLIGENCE — PASSENGERS — BOARDING STREET CAR IN MOTION—NONSUIT. In an action for death resulting from personal injuries received by a passenger in attempting to board a street car, there is no evidence of negligence on the part of the defendant, and a nonsuit is properly directed, where it appears that the car had stopped to take on passengers waiting at the far crossing, and that the deceased approached from the rear and attempted to board the rear platform as the car was starting, there being no evidence that the conductor saw, or by the exercise of reasonable care, should have seen, that he was intending to board the car.

Appeal from a judgment of the superior court for King county, Morris, J., entered June 27, 1905, upon granting a nonsuit, in an action for death resulting from injuries sustained by a passenger in attempting to board a street car. Affirmed.

Baxter & Wilson, for appellants.

Hughes, McMicken, Dovell & Ramsey, for respondent.

MOUNT, C. J.—This is an action for damages on account of personal injuries, which are alleged to have resulted in the death of W. H. Woodman. The action was brought by the widow and minor children of the deceased. The complaint alleged negligence as follows:

[1]Reported in 85 Pac. 23.

"That on or about the 2d day of September, 1904, the said W. H. Woodman presented himself as a passenger on one of defendant's cars upon C street, in the city of Ballard; that near the intersection of said C street and Main street, the said W. H. Woodman signalled to the conductor and driver in charge of said car to stop the same for the purpose of allowing the said Woodman to enter thereon; that said car was thereupon stopped and the said Woodman thereupon attempted to board the same, but that, through the negligence and carelessness of the driver or conductor of said car or of both of them, said car was started while he was part way upon said car and before he had obtained a secure footing thereon."

At the close of plaintiffs' evidence, the trial court dismissed the action, for the reason that the evidence failed to show any negligence on the part of the defendant company, and for the further reason that the injuries received by the deceased were caused by his own careless and negligent acts.

There was but one witness who testified to the accident. The facts are not disputed, and are substantially as follows: The defendant company operated an electric street car line between Ballard and Seattle. On November 2, 1904, a car bound for Seattle was going east on C street, in the city of Ballard. When the car came to Main street, which crosses C street at right angles, two ladies were waiting there to board the car. The car stopped for these ladies at the east side of Main street. The ladies immediately boarded the rear platform of the car. When the car stopped Mr. Woodman was somewhere between the rear of the car and the southwest corner of the intersection of Main and C streets, walking very fast to catch the car. He reached the car about the time it started, and took hold of it and attempted to board it. As he did so his foot slipped from the bottom step, and he landed on the board pavement, still holding to the car with his hands. He again attempted to get his feet on the step, but failed, and holding on to the car, was dragged about fifty or sixty feet when the car was stopped. When he attempted to

get on the car the second time, the conductor caught him by the arm and attempted to assist him, but without success. When the car stopped, he got up from the ground, brushed himself, and boarded the car and rode to his destination. He died on January 5, 1905. The evidence in the record does not show the character of the injuries.

No negligence of the respondent company is shown in this case. The only possible claim of negligence which could be made is the one which is attempted to be made, viz., that the conductor of the car saw, or should have seen, that Mr. Woodman intended to board the car before the car was started. There is no evidence that the conductor actually saw him until after he had attempted to board the car and slipped off. The car was then in motion. Nor is there any evidence that the conductor in the exercise of reasonable care, should have seen that Mr. Woodman was intending to board the car before it started, or before the signal to start was given by the conductor to the motorman. Mr. Woodman was not with the ladies when the car stopped for them, nor was he at the entrance of the car when it was stopped, but was to the rear thereof, and it does not appear that he was in sight of the conductor. He did not reach the car until it was in motion or about to start, and evidently after the signal to start had been given by the conductor. Unless it was shown that the conductor should have seen the deceased, or that the latter was intending to board the car before the signal to go ahead was given, or before the car started, the conductor was not negligent and, of course, the respondent was not negligent. *Foster v. Seattle Electric Co.*, 35 Wash. 177, 76 Pac. 995. The evidence does not show that the conductor was not at his station, nor does it show any facts from which the jury might reasonably conclude that the company was negligent.

The judgment is therefore affirmed.

ROOT, FULLERTON, HADLEY, CROW, and DUNBAR, JJ., concur.

[No. 5948. Decided March 22, 1906.]

THE STATE OF WASHINGTON, *on the Relation of E. J. White et al., Appellant,* v. POINT ROBERTS REEF FISH COMPANY *et al., Respondents.*[1]

QUO WARRANTO—TO CORPORATIONS—JURISDICTION—PARTIES—PRIVATE CITIZENS AS RELATORS—INTEREST. The courts have no jurisdiction of a proceeding in the nature of a *quo warranto* to enjoin the wrongful acts of corporations, prosecuted on the relation of private citizens, on the refusal of the prosecuting attorney to institute such proceeding on his own relation, where it is not alleged that the relators claim any interest in the office, franchise or corporation which is the subject of the information, as required by Bal. Code, § 703, their remedy being by motion to compel the prosecuting attorney to act, and by appeal from an order thereon.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered April 24, 1905, dismissing a proceeding in quo warranto, upon sustaining a demurrer to the information. Affirmed.

Dudley G. Wooten and *James B. Reavis,* for appellant.
Kerr & McCord, for respondents.

PER CURIAM.—This was an action in the nature of a *quo warranto* proceeding, brought in the name of the state, to enjoin the corporate acts of the defendant companies, and to declare void their charters and all fish licenses and locations claimed by them, or by any one holding by or under them, for various unlawful and wrongful acts and omissions complained of, which, with the view we take of the law, it is not necessary to particularly specify here. In addition to the various allegations aforesaid, which included the allegation that the defendants had fraudulently possessed themselves of more fishing locations than they were entitled to under the law, to the detriment of the relators, who had taken out fishing licenses, it was alleged, that on or about the 17th day

[1]Reported in 85 Pac. 22.

of November, 1904, the relators, through their attorneys, presented the facts which are set out in the information to the prosecuting attorney of Whatcom county, Washington, wherein the principal office of the aforesaid defendant companies purported to be located; and likewise presented to him an information in the nature of a *quo warranto* in the name of the state of Washington, on relation of said prosecuting attorney, against the above named defendants, seeking substantially the same relief upon the part of the state through its said public officer that is now and here sought by the said relators on their own relation, and that the said prosecuting attorney was requested to file and prosecute the said information in the name of the state; that thereupon the said prosecuting attorney duly signed, verified and filed said information; that the same was presented to the court, and an order was entered setting down for hearing the prayer for temporary injunction contained in said information; that thereafter, in the absence of the attorneys for the relators, who were associate counsel in said action, and without intimation or notice to them or any knowledge on their part, and without notice to the relators or to any person similarly situated, the said prosecuting attorney, on November 22, 1904, filed in the court a written motion dismissing said information and action without assigning any reason or ground therefor, and said cause was by order of the court dismissed; that thereafter the attorneys for the relators appeared, in accordance with the previous order of the court above mentioned, on Tuesday, November 29, 1904, for the purpose of attending the hearing set by the court theretofore, and to present to the court facts and authorities in support of the prayer for temporary injunction contained in the said information filed by the said prosecuting attorney, and then and there, for the first time, became advised of the nature and extent of the said prosecuting attorney's action in dismissing and disposing of said cause, and presented to the court a motion, supported by affidavits, setting forth the facts hereinbefore re-

ferred to, and praying the court that the said relators be permitted, in their own right and upon their own relation, to prosecute the said information in the name and by the authority of the state of Washington, for their own relief and protection, and the relief and protection of all other persons belonging to their class, and who were similarly situated and interested; that the prosecuting attorney protested against and resisted said motion and the relief therein prayed for, and that the court declined to grant the motion of relators' attorneys.

Certain portions of the complaint were striken on motion of the defendants' attorneys, and a demurrer was then interposed to the information, which was sustained by the court. The demurrer was to the effect that the court had no jurisdiction either of the defendants or of the subject-matter of the action; that the plaintiffs had no legal capacity to sue; that there was a defect of parties plaintiff; that the complaint did not state facts sufficient to constitute a cause of action; that there was a defect of parties defendant. The record is silent as to what ground the demurrer was sustained upon. It was presumably upon the ground that the court had no jurisdiction for the reason that the action was not brought by the prosecuting attorney.

We will not enter into a discussion of the many questions raised in the respective briefs of counsel, for the reason that no interest is alleged by the relators in the franchises or corporation which is the subject of the information, and the action for the revoking of the franchises of the corporation should have been brought on the relation of the prosecuting attorney. This court has decided this question in the case of *Mills v. State ex rel. Smith,* 2 Wash. 566, 27 Pac. 560, where it was held that the legislature had looked out for the interest of the public by providing that the information should be filed by the prosecuting attorney, and that the private interests were provided for in the latter part of § 703, Bal. Code, in the clause, "or by any other person, on his own rela-

tion, whenever he claims an interest in the office, franchise or corporation which is the subject of the information." We also held in *State ex rel. Attorney General v. Seattle Gas etc. Co.*, 28 Wash. 488, 68 Pac. 946, 70 Pac. 114, that informations of this kind should be brought by the prosecuting attorneys of the different counties. Section 5781, Bal. Code, provides that the information may be filed by the prosecuting attorney in the superior court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority. It must not be understood that it is within the power of the prosecuting attorney of any county to capriciously or fraudulently prevent the state or its citizens from compelling corporations to obey the laws, or to deprive the state or its citizens of a judicial investigation of alleged violations of the law on the part of the corporations. But instead of proceeding upon their own relation, as the appellants did in this case, they had a right to ask the court to direct the prosecuting attorney to proceed with the case upon the showing made in their complaint, and if the court refused to do this, an appeal would lie to this court and the question of the sufficiency of the complaint would be determined on such appeal. But as there is no provision of the law for the procedure suggested by the appellants, the judgment of the court in sustaining a demurrer to the complaint must be affirmed.

[No. 5981. Decided March 22, 1906.]

RONALD T. KNIGHT *et al., Appellants, v.* WILLIAM GALLAWAY *et al., Respondents.*[1]

ADOPTION — JURISDICTION — APPLICATION BY NONRESIDENTS. The courts have no jurisdiction to entertain a petition by nonresidents to adopt a child, Bal. Code, § 6480, limiting the right of adoption to residents of the county where the application is made.

SAME—WELFARE OF CHILD. An order for the adoption of a child will be reversed where it appears from the evidence that it is not to the welfare of the child that the applicants be permitted to adopt her.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered May 10, 1905, for the adoption of a child, after a hearing upon conflicting applications. Reversed.

W. D. Scott, for appellants.

Richardson, Roche & Onstine, for respondents.

FULLERTON, J.—This is an appeal from an order of adoption. From the record it appears that Nettie Beatrice Walsh is an orphan female child, of the age of seven years; her father having died in her infancy and her mother on February 18, 1905. Since her infancy, she has been in the custody of the respondents, although her mother while she lived kept control over her and contributed to her support. In April following the death of the mother the respondents filed a petition in the superior court of Spokane county, that being the county of their residence, praying for leave to adopt the minor as their own child. While this petition was pending, the appellants appeared and filed an answer thereto, and a counter-petition, in which they controverted the allegations of the respondents' petition, and asked that an order of adoption be made in their favor. It appeared from the appellants' petition that they were residents of the state of Montana, and

[1]Reported in 85 Pac. 21.

on the hearing the superior court held that it had no jurisdiction to entertain their petition because of their nonresidence. It then examined the evidence and held that the respondents were suitable and proper persons to have the care and custody of the child, and entered the order from which this appeal is taken.

In deciding that the appellants were not entitled to petition in this state for the adoption of the child we think the trial court ruled correctly. The statute on that subject reads in part as follows:

"Any inhabitant of this state not married, or any husband and wife jointly, may petition the superior court of their proper county for leave to adopt a child under the age of twenty-one years, not their's by birth, and for a change of name of said child; . . ." Bal. Code, § 6480.

While this clause is somewhat awkward, both in expression and phraseology, we think its meaning plain. We think the legislature intended by it to limit the right to petition the courts of this state for leave to adopt a child to inhabitants of the state, and to require married persons to join in any petition presented on their behalf; and that it was an effort to express these different ideas by the use of too few words that gives rise to such uncertainty as appears in the language used. That this is the proper construction of the statute is borne out by the further clause requiring the petitioners to present their petition to the court of "their proper county." The phrase "their proper county" must mean the county in which the petitioners reside, if it has any meaning at all, and to give it this meaning precludes the idea that a nonresident of the state has the right to petition.

But while we are of the opinion that the court did not err in holding that it was without jurisdiction to grant the petition of the appellants, we are equally of the opinion that it erred in granting the petition of the respondents. In determining whether leave to adopt a child should be granted by the court the welfare of the child is the primary if not the

sole consideration, and we are convinced that it is not to the welfare of this child that the respondents be permitted to adopt her. Without quoting from the record the evidence that has driven us to the conclusion, we feel that so far from promoting her welfare it would be a positive wrong to her to permit the order to stand.

The order appealed from will be reversed, and the cause remanded, with instructions to deny to each of the applicants the right of adoption.

MOUNT, C. J., HADLEY, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 5801. Decided March 22, 1906.]

MOON BROTHERS CARRIAGE COMPANY, *Respondent*, v. O. G. DEVENISH *et al.*, *Defendants*, E. E. PLOUGH, *Appellant*.[1]

PARTNERSHIP — NOTE OF SUCCESSOR FOR FIRM DEBT — PAYMENT. The acceptance by a creditor of a firm of the individual note of one of the partners, after a dissolution, will not operate as a payment of the pre-existing debt, or discharge the other partner, where it was not agreed or intended to have that effect.

PRINCIPAL AND AGENT—TRAVELING SALESMAN—NOTICE—AUTHORITY AS TO COLLECTIONS. Notice to a traveling salesman, the agent of a creditor, that a partnership had been dissolved, and that one of the partners had assumed payment of the firm debts, is not proof of notice to his principal, in the absence of evidence showing that he had authority over the collection of the account due his principal from the firm; since the scope of the authority of a traveling salesman does not extend to collections.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered June 9, 1905, upon findings in favor of the plaintiff after a trial on the merits before the court without a jury, in an action to recover for goods sold and delivered. Affirmed.

Wm. T. Stoll, and *B. B. Adams*, for appellant.

Thomas Neill (W. H. Winfree, of counsel), for respondent.

[1]Reported in 85 Pac. 17.

HADLEY, J.—This is an action to recover on account for goods sold and delivered. The complaint, in the usual form, alleges the amounts of sales and the balance due and unpaid. It is also alleged that the sales were made between the 1st day of July and the 4th day of December, 1902, and that the defendants were, during all that time and until the 3d day of February, 1903, copartners doing business under the firm name of Devenish Hardware Company. The defendant Plough answered separately, and admitted the existence of the partnership at the time the goods were sold and delivered; but alleged that, after the indebtedness was contracted, to wit, on January 28, 1903, defendants dissolved partnership and that, by an instrument in writing, the defendant Devenish assumed and agreed to pay all debts of the partnership including that held by the plaintiff, of which plaintiff had knowledge; that the plaintiff, without the knowledge or consent of defendant, accepted in payment of said indebtedness three promissory notes of the defendant Devenish, bearing date May 15, 1903, for specified amounts, and maturing respectively August 1st, September 1st, and October 20th, 1903. The reply denies that plaintiff had any knowledge of any agreement on the part of defendant Devenish to assume the debts of the partnership. It is also denied that the promissory notes were accepted in payment of the debt, and it is alleged that they were accepted merely as evidence of the indebtedness and of the agreement to extend the time of its payment. On the above issues the cause was tried by the court without a jury, and judgment was rendered against both defendants for the sum of $2,546.12 and costs. The defendant Plough has appealed.

It is assigned that the court erred in its sixth finding of fact. The finding was to the effect that, at the time the notes were given, respondent had no notice or knowledge of any agreement between the partners whereby Devenish had assumed the payment of the debts of the firm, but that it did have knowledge of the dissolution of the partnership. This

finding should be considered in connection with the seventh finding, upon which error is also assigned. That finding is, in substance, that the goods were sold by a traveling salesman of the name of Moore; that he had authority from respondent to fix the price and terms of sale; that in April, 1903, Moore applied to appellant at Spokane to sell said firm more goods on the part of respondent, at which time appellant informed Moore that he—appellant—was no longer a member of the firm, and that Devenish had assumed all the liabilities of the firm, including the debt owing to respondent; that this conversation was prior to the execution of the notes, but that Moore had no power to collect or settle accounts and had no authority over this account after making the sale; that Moore did not notify respondent of this conversation, or of any facts therein stated; that all the dealings between the parties concerning this account, after the goods were sold, were had directly with respondent.

The court also found in its fifth finding that the notes were given as the result of a request from Devenish, made on January 30, 1903, for an extension of time, at which time he advised respondent of the dissolution, but did not advise it that he had assumed the debts of the firm; that the notes were executed by Devenish under the firm name, and were taken to close the account, but were not accepted in payment of the indebtedness. It appears by the record that an exception was originally taken to the fifth finding, but by a stipulation filed, it is stated that it was the intention to except to the sixth and seventh findings and not to the fifth and seventh, as stated in the original exceptions. There is, therefore, no exception to the fifth finding, and no error is assigned thereon. By that finding it is an established fact in the case that the notes were not taken as a payment or discharge of the original indebtedness.

"Where a creditor of a firm accepts for the amount of his claim the individual note of one of several partners, or of a

new firm formed on the retirement of one or more members of the original debtor firm, and thereupon surrenders his original evidence of debt, such transaction will discharge the other partners if it was intended to have that effect; otherwise they will remain liable." 22 Am. & Eng. Ency. Law (2d ed.), 184.

Note, also, the following, which is found at pages 555-8 of the same volume:

"According to the general doctrine a promissory note, though negotiable, given by a debtor to his creditor, does not operate as payment of a pre-existing indebtedness, in the absence of an agreement between the parties that it shall so operate, and an action may be still maintained on the original indebtedness. And the same is true with regard to a note given to the creditor by a part of several or joint debtors; or the note of a third person; or a note given on which both the debtor or a part of joint debtors and third persons are liable." See, also, cases there cited in support of the above. The debt therefore remained as before, except that the time of payment was extended until the due dates of the notes. *Dellapiazza v. Foley,* 112 Cal. 380, 44 Pac. 727.

It is conceded by respondent that, if it had known at the time the notes were taken which extended the time of payment, that Devenish had agreed to pay the debt individually, then appellant would have been released from liability. It is conceded that the authorities hold that when a partner retires and the remaining partner assumes the firm debts, then the relation of principal and surety arises between them, the retiring partner sustaining the relation of surety to the remaining one. It is also conceded that a creditor of the firm, who knows of such agreement, is bound thereby, and that any act of the creditor having such knowledge which would release an ordinary surety, will release the retiring partner. This case therefore really turns upon the question whether the respondent had knowledge of any such agreement between the partners. The court has found that respondent had no such knowledge, and we think we should not be justified in disturbing the finding. The mere fact that Moore,

the traveling salesman, was told of the agreement between the partners at a time prior to the taking of the notes which extended the time of payment, does not establish that respondent itself was advised of it. The court found that Moore did not advise respondent of it. The burden was upon appellant to prove, by a preponderance of evidence, that respondent had such knowledge. There was no direct proof that Moore had authority over collection of the account. It cannot be presumed as a matter of law, from the mere fact that Moore was the traveling salesman who sold the goods, that the collection of the account was a matter that came within the scope of his authority and duties, and that his knowledge therefore became notice to respondent.

"The scope of a commercial traveler's authority is well defined, and as a general rule, extends only to the soliciting of orders for goods. . . . Third parties dealing with him are bound at their peril to ascertain his real powers; . . . In case of salesmen intrusted with possession of the property to be sold, it is well settled that there is an implied authority to receive payment. But where the agent is merely a drummer, not intrusted with possession of the property—one of the *indicia* of ownership—the great preponderance of authority denies such a power, in the absence of a controlling usage to the contrary." 6 Am. & Eng. Ency. Law (2d ed.), pages 224-6.

In *State ex rel. St. Joseph etc. R. Co. v. Commissioners etc.,* 10 Kan. 569, Justice Brewer, in speaking of the scope of agency, said:

"Authority from a principal to an agent to do a specified act is limited to that act, and does not empower the agent to bind his principal to an act securing essentially different rights and imposing essentially different obligations."

The supreme court of Minnesota discussed this subject in *Trentor v. Pothen,* 46 Minn. 298, 49 N. W. 129, 24 Am. St. 225, and said:

"The rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose au-

thority the subject-matter lies; in other words, the knowledge or notice must come to an agent who has authority to deal in reference to those matters which the knowledge or notice affects. The facts of which the agent had notice must be within the scope of the agency, so that it becomes his duty to act upon them or communicate them to his principal."

Having in view the above legal principles, and also the testimony as introduced, we think the evidence supports the court's findings, and that the judgment rendered was proper under the findings. It is therefore affirmed.

MOUNT, C. J., FULLERTON, ROOT, CROW, and DUNBAR, JJ., concur.

[No. 6012. Decided March 22, 1906.]

JAMES HENRY *et al., Respondents,* v. THE CITY OF SEATTLE, *Appellant.*[1]

PUBLIC LANDS—HIGHWAYS ACROSS TIDE LANDS—LEGISLATURE—POWER TO VACATE STREETS. The legislature has the power to vacate streets platted across the tide lands the fee of which was still in the state, where no private rights had intervened; and the approval of a plat made by the tide land commissioner which conflicts with former plats by upland owners necessarily vacates the former plat and all streets in conflict with the latter plat.

SAME—CANCELLATION OF CONTRACTS—STREET PROJECTIONS. Laws 1897, p. 30, authorizing the vacation of tide land contracts covering legally established street projections has no application to a contract made subsequently to the legal vacation of such streets.

SAME—ESTOPPEL TO QUESTION VACATED PLAT. The purchaser of tide lands according to the latest plat thereof legally existing at the time of the purchase is not estopped to dispute a former plat of the same lands which was vacated by the approval of the latter plat.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 14, 1905, upon findings in favor of the plaintiffs, after a trial on the merits, in an action to quiet title. Affirmed.

[1]Reported in 85 Pac. 24.

Scott Calhoun and *O. B. Thorgrimson,* for appellant.

Metcalfe & Jurey, for respondents.

MOUNT, C. J.—Plaintiffs brought this action to remove a cloud from the title to certain lots in the city of Seattle. The question in the case was whether or not a certain street, known as "Hill" street, extended across the plaintiffs' lots. The trial court found that it did not, and entered a decree accordingly. The city appeals.

The facts are as follows: The lots in question are tide land lots in block 243, of the Seattle Tide Lands, as platted by the board of tide land appraisers under the act of March 26, 1890 (Laws 1889-90, p. 431). In the year 1870 one T. I. McKenny platted into streets, lots, and blocks, what is known as "Central Seattle," which comprised a tract of land lying east of Elliott bay, and extending up to the line of ordinary high tide, on the east shore of Elliott bay. One of the streets in this addition was known as "Hill" street, which extended east and west through the said addition. From the date of the plat to the present time, Hill street has been, and now is, one of the upland streets of said city. On February 28, 1884, during territorial days, the owners of the upland adjoining the tide lands of Elliott bay, platted into streets, lots, and blocks, the tide lands lying immediately to the west of their upland possessions, and in such plat extended Hill street, as laid out in the plat of Central Seattle, in a direct line west over and across the tide lands. This plat was designated and known as "City Front Addition." All the streets, lots and blocks in this addition were covered with water.

In 1895 the local board of tide land appraisers, appointed under the act of 1890, examined, certified and platted all of the Seattle tide lands into streets, lots and blocks, designating the same as "Plat of Seattle Tide Lands." Thereafter, on March 26, 1895, the plat so made, and the acts of the said board in reference thereto, were ratified by the state legislature. Laws 1895, p. 527, §§ 54, 64. The plat made by the

board of tide land appraisers in 1895 covered the greater part of the tide lands formerly platted, as stated above, under the name of City Front Addition. A street running northerly and southerly near the shore line was designated as "Seattle boulevard." The streets, lots and blocks to the east of this boulevard were not changed in the new plat, but the lands lying to the west of this boulevard were entirely replatted without reference to the old plat. So that the streets on the plat of City Front Addition lying to the east of Seattle boluevard extended only to said boulevard, while to the west an entire new plat was made. The blocks were platted much larger, and the streets much wider, so that the streets running east and west on the east side of Seattle boulevard did not coincide with the streets on the opposite side. All the streets in this plat were water streets, existing only on paper.

Block 243, Plat of Seattle Tide Lands, in which respondents' lots are located, lies on the west side of Seattle boulevard. Before the Seattle tide land plat was made, Hill street, as platted by City Front Addition, extended across this block and covered a part of the land now owned by respondents. In 1895, after the Plat of Seattle Tide Lands, the Seattle Transfer Company applied to the state to purchase the lots in question, according to the Plat of Seattle Tide Lands, and in January, 1897, a contract was entered into by the state with the Transfer Company, and in 1901 a deed was issued therefor. Respondents by mesne conveyances, have acquired the title.

In 1896, the city of Seattle applied to the board of state land commissioners to change the Plat of Seattle Tide Lands, so as to make an extension on Hill street and other streets one block further west, which would extend said street across block 243, Seattle Tide Lands, where appellant maintains that it now is. The board of state land commissioners refused to act upon this petition, and thereupon an action in mandamus was brought to compel them to do so. The action was dismissed, and an appeal was taken to this court, and

the judgment of the lower court was affirmed. *Seattle v. Forrest,* 14 Wash. 423, 44 Pac. 883. In 1897, after the contract had been entered into between the state and the Seattle Transfer Company, who purchased the lots in question, the legislature passed an act directing the board of state land commissioners to cancel all deeds and contracts covering tide land lots which were legally established street projections and extensions, where such streets or extensions had not been duly vacated, and authorized a refunding of the money paid on such contracts. Laws 1897, p. 30. Thereafter on June 18, 1897, without notice to any one, the board of state land commissioners entered an order on their minutes cancelling certain contracts, and among them, the contract for the lots now owned by respondents; but no money was ever refunded, and subsequently a deed was issued by the state therefor.

During all the time up to the time of the filing of the plat by the board of tide land appraisers in 1895, the fee of the tide lands was in the state. There was no adverse claim against this fee. Assuming that the plat made and filed by the upland owners in 1884 was authorized by law then in force, still the state, by its constituted authorities, had power to abandon or vacate the plat and the streets and blocks theretofore made, and make another plat, if it saw fit to do so; especially where private rights had not intervened, and were not interfered with. The rule is thus stated by Mr. Dillon, in his work on Municipal Corporations, vol. 2 (4th ed.), at § 666:

"The plenary power of the legislature over streets and highways is such that it may, in the absence of special constitutional restriction, vacate or discontinue the public easement in them, or invest municipal corporations with this authority."

To the same effect, see, §§ 651 and 651a, same volume; Elliott, Roads and Streets (2d ed.), § 857; 27 Am. & Eng. Ency. Law (2d ed.), p. 113; *San Francisco v. Burr,* 108 Cal. 460, 41 Pac. 482; *Brook v. Horton,* 68 Cal. 554, 10 Pac. 204.

In the case of *San Francisco v. Burr, supra,* the court said, quoting from *Polack v. San Francisco Orphan Asylum,* 48 Cal. 490:

"That the legislature possesses competent power to vacate a street in a city; that the legislature may delegate or commit such power to the municipal authorities of the city; that its exercise by the municipal authorities is dependent on the will and subject to the control of the legislature; and that after such power has thus been committed to the municipal authorities, the legislature may revoke it in part, as well as in whole, or, without any express revocation, may itself exercise it in any particular instance, are propositions about which there can be no controversy in this state. The plenary power of the legislature over the whole domain of streets, is well illustrated by the decisions of this court in the litigation respecting Kearny, Second and Beale streets, in the city of San Francisco.'

There are no constitutional restrictions upon the legislature in regard to the vacation of streets in cities in this state. Its power is therefore supreme. When the last plat was made and filed and approved by the legislature of the state, which had full authority over its own lands, such plat necessarily vacated the former plat, including all streets and lots and blocks which were in conflict with the latter plat. Otherwise there would be two conflicting plats existing upon the same land at the same time, which would lead to utter confusion. For this reason it follows conclusively that the legislature intended by the approval of the second plat to vacate the former plat, in so far as the latter plat covered ground occupied by the former. *Brook v. Horton, supra.* The only legal streets to the west of Seattle Boulevard are the streets as designated on the Plat of Seattle Tide Lands. Hill street, therefore, terminates at the east line of Seattle boulevard, and does not extend across respondents' lots. The act of 1897, purporting to authorize the cancellation of contracts for tide land lots which were street projections or extensions, had no application to the respondents' lots, because that part of Hill street which had

formerly extended over the lots had been legally vacated long prior to the passage of that act.

Appellant argues that respondents are estopped to say that Hill street does not extend across their lots on the west side of Seattle boulevard, because their grantors were permitted to purchase the said lots by reason of having purchased lots in City Front Addition on the east side of said boulevard, and several cases are cited from this court to the effect that, where one purchases lots according to a certain plat, he is bound by this plat. If this rule is applicable to this case at all, it is favorable to respondents, because respondents did not, nor did their predecessors in interest, purchase the lots in block 243, Seattle Tide Lands, as platted in City Front Addition. Those lots were purchased after City Front Addition to the west of Seattle boulevard had been vacated. That part of City Front Addition to the east of Seattle boulevard was adopted by the Plat of Seattle Tide Lands, and therefore became a part of Seattle Tide Lands. Respondents are not attempting to question the plats by which they purchased their lots, but are maintaining, and have a right to maintain, that they purchased according to the plat legally existing at the time of the purchase, and that prior plats had theretofore been vacated.

The judgment of the lower court is right, and is therefore affirmed.

ROOT, FULLERTON, HADLEY, CROW, and DUNBAR, JJ., concur.

[No. 6074. Decided March 22, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. B. A. WEISENBERGER, *Appellant*.[1]

HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE—EXTENT OF WOUND. In a prosecution for assault with intent to kill by shooting, it is not prejudicial error to permit the prosecuting witness to show the character and extent of the wound by stating how long he was under the doctor's care.

SAME—HEARSAY EVIDENCE—DRAWN OUT ON CROSS-EXAMINATION—HARMLESS ERROR. In a prosecution for an assault with intent to kill, the accused cannot complain of the hearsay statement of a witness that she had been told that the accused said he would shoot, when the same was drawn out by counsel for the accused in answer to a question as to why the witness made the statement that the accused was trying to shoot.

SAME—EVIDENCE OF INTENT—COMPETENCY. In a prosecution for assault with intent to kill, the fact that the accused had insulted the daughter of the prosecuting witness the night before, and had threatened to shoot in case she reported the matter, is material to show intent in drawing the revolver and shooting when called out by the prosecuting witness.

SAME—ACCIDENTAL SHOOTING—INSTRUCTIONS NOT REQUESTED. In a prosecution for assault with intent to kill, error cannot be predicated upon the failure of the court to instruct the jury on the theory of an accidental discharge of the revolver during a struggle, where no instructions thereon were requested.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 14, 1905, upon a trial and conviction of the crime of assault with intent to kill. Affirmed.

W. H. Abel, for appellant.

E. E. Boner, for respondent.

ROOT, J.—For some time prior to the occurrences hereinafter stated, appellant was a roomer at the hotel of Mr. and Mrs. Parkhurst, in the city of Aberdeen. One evening, a

[1]Reported in 85 Pac. 20.

daughter of Mrs. Parkhurst accompanied the appellant to Hoquiam, a few miles distant, and while there was requested by appellant to go with him to a room over a saloon. She resented this suggestion, and upon arrival home, related what had occurred to her mother, who in turn informed her husband. On the next morning Mr. Parkhurst, for the purpose, as he says, of requesting appellant to leave the hotel, called the latter from the hotel sitting room, where he was in company with several other persons, into the hallway. Before he had spoken to him, however, his wife entered the hallway from a different room, and immediately asked appellant why he had insulted her daughter. Thereupon appellant drew a revolver and made a motion as if to shoot Parkhurst. Mrs. Parkhurst grappled with him and struggled to prevent him from using the revolver. However, he managed to throw her to one side and fired, the shot taking effect in Mr. Parkhurst's head, causing a serious injury. Appellant then fled, but was soon thereafter apprehended. He was subsequently prosecuted upon the charge of an assault with intent to commit murder, and was convicted and sentenced to a term of six years in the penitentiary. From this judgment and sentence, an appeal is prosecuted.

Appellant assigns as error the action of the trial court in permitting Mr. Parkhurst to state upon the witness stand how long he was under the doctor's care. Respondent claims that this evidence was competent and material as showing the character and extent of the wound, and had a bearing upon the question of appellant's intent in producing such a wound. While its materiality is open to serious doubt, we are of the opinion that the reception of this evidence was in no wise prejudicial to appellant.

In the course of her evidence, Mrs. Parkhurst stated that appellant was trying to shoot her husband. Appellant's attorney asked her why she made that statement. She answered: Because my daughter told me he said he would

shoot." Appellant's counsel moved to strike this answer as being hearsay evidence, which motion was denied. This ruling is assigned as error. We do not think it was error. The evidence shows that appellant had drawn a revolver and was in a struggle evidently attempting to shoot Mr. Parkhurst, and this, together with what her daughter had told her of a threat of appellant, made the night before, "to shoot," induced her to believe that he was trying to shoot her husband, and the question of appellant's counsel having brought out this answer, we do not think he is in a position to complain.

It is also urged by appellant that it was error to permit testimony tending to show that appellant had insulted Mrs. Parkhurst's daughter the night before. It was incumbent upon the state to prove an intention on the part of appellant to commit murder. For this purpose it was competent to show a motive on the part of appellant to commit such crime. The fact that he had insulted the daughter the night before, and had threatened to shoot in case she reported the matter, was material and competent as bearing upon the question of his intention in drawing the revolver and shooting as he did.

Error is also assigned upon the omission of the court to instruct upon the hypothesis of the revolver being accidentally discharged. No request for an instruction of this kind was made by appellant. The instructions given by the trial court appear to have covered the issues involved, and to have been fair and comprehensive, and we do not think this assignment is well taken.

From the record we think it satisfactorily appears that the appellant had a fair trial, was well defended, and that the judgment of the superior court was abundantly justified by the evidence and the law of the case. It is therefore affirmed.

MOUNT, C. J., DUNBAR, CROW, HADLEY, and FULLERTON, JJ., concur.

[No. 5949. Decided March 23, 1906.]

G. E. DICKSON, *Trustee, Respondent,* v. THE COUNTY OF KITTITAS, *Appellant.*[1]

TAXATION—EXCESSIVE LEVY—POWER OF COURTS TO REDUCE. Where it appears that property was assessed at over $20,000 one year, and $8,000 for subsequent years, which was about its market value, and that like property on the opposite corner of the street was assessed much lower than the property in question, the assessment is properly set aside and reduced to $8,000.

Appeal from a judgment of the superior court for Kittitas county, Rigg, J., entered May 15, 1905, upon findings in favor of the plaintiff, after a trial on the merits, reducing an assessment for taxation. Affirmed.

Austin Mires and *Pruyn & Slemmons,* for appellant.

Eugene E. Wager, for respondent.

MOUNT, C. J.—Respondent brought this action to vacate an assessment of certain described real estate in Kittitas county, and to cancel the taxes levied against the property for the years 1899, 1900 and 1901, upon the alleged ground that the assessing officers knowingly, arbitrarily and fraudulently assessed the said property for said years largely in excess of its true value, and two or three times the value of other like and adjoining property in the same neighborhood. Upon the issues made by the pleadings the trial court, after hearing the evidence, found that the property had been unlawfully assessed for the year 1899 at $20,960, and entered a decree reducing the assessment to $8,000 for that year, but refused to reduce the assessment for the years 1900 and 1901. The decree required respondent to pay the taxes upon the assessment, with interest at fifteen per cent per annum from the date of delinquency. The county appeals.

There is no dispute in the facts, which show that the prop-

[1]Reported in 84 Pac. 855.

erty in question was assessed at $20,960 for the year 1899, and at $8,000 for each of the two succeeding years. The evidence shows, that the market value of the property was about $8,000; that it was sold in 1899, after the assessment had been made for $10,350; that property on the opposite corners of the street from this property, and of two or three times its value, was assessed much lower than the property in question. The alleged and proven facts in this case bring it squarely within the case of *Henderson v. Pierce County*, 37 Wash. 201, 79 Pac. 617, where we said:

"In *Templeton v. Pierce County, supra*, we held that it was no ground for relief against excessive valuation of property that the assessor had merely overvalued the property, if it appeared that his action was not arbitrary or capricious, and the property had been assessed in the same proportion as other like property within the jurisdiction of the assessing officer, and we held in that case that the evidence did not show any cause for declaring the assessment illegal. The appellant invokes the principle here, but we think the evidence much stronger in this case than in the one cited. The evidence here shows not only a gross overvaluation of the respondent's property, but it shows a gross overvaluation, we think, when compared with other property of like kind within the assessor's jurisdiction. Of course, slight or even considerable differences in valuation are not sufficient, when honestly made, to authorize the court to set aside an assessment. Where, however, the assessment is many times the actual value of the land, and is higher proportionally than other property, a condition does arise when the courts are authorized to do so. *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101, 34 Pac. 563; *Benn v. Chehalis County*, 11 Wash. 134, 39 Pac. 365; *Lockwood v. Roys*, 11 Wash. 697, 40 Pac. 346; *Knapp v. King County*, 17 Wash. 567, 50 Pac. 480.

For the reasons there stated, the judgment must be affirmed.

ROOT, DUNBAR, CROW, FULLERTON, and HADLEY, JJ., concur.

[No. 5927. Decided March 23, 1906.]

J. W. ARTHUR, *Appellant,* v. THE WASHINGTON WATER POWER COMPANY, *Respondent.*[1]

ACTIONS — ABATEMENT — STAYING PROCEEDINGS — FAILURE TO PAY COSTS OF FORMER ACTION. Upon a prosecution of a second action for the same cause, after a voluntary dismissal of the former action at plaintiff's costs, it is proper to stay the proceedings of the second action until the costs in the first action are paid, where the order was in effect one for the payment of such costs.

SAME—DISMISSAL—FAILURE TO PROSECUTE. The dismissal of an action for failure to prosecute it with diligence, entered on the 14th day after staying proceedings until the costs of a former action had been paid, is not error where the action had been pending two and one-half years and there was no showing that the appellant could not have paid the costs within such time.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 18, 1905, dismissing an action on motion of the defendant, for failure to prosecute with diligence. Affirmed.

C. S. Voorhees and *Reese H. Voorhees,* for appellant.

H. M. Stephens, for respondent.

HADLEY, J.—This appeal is from a judgment dismissing an action for failure to diligently prosecute it. The complaint and summons were served upon the defendant on July 8, 1902. On the 25th day of the same month certain motions were served and filed by the defendant, among which was a motion for an order requiring the plaintiff to pay the costs of an action theretofore instituted by the plaintiff against the defendant, such payment to be required as a condition precedent to the prosecution of this action. The motion stated that the former action was for the same cause as that set forth in this complaint. The motion was supported by affidavit which stated that the former action was voluntarily

[1]Reported in 85 Pac. 28.

dismissed by the plaintiff, and that costs were taxed in favor of the defendant against the plaintiff, in the sum of $73, no part of which had been paid. The action remained in that condition from July, 1902, until March 1, 1905, when the defendant caused the motion to be noted for hearing on March 4. On the last named date, after a hearing, the court entered an order sustaining the motion, and also ordering that further proceedings in behalf of plaintiff be stayed until he should pay said judgment for costs. Following the above order, the defendant moved the court for an order dismissing the cause, for the reason that the plaintiff had failed to diligently prosecute the action. The motion was supported by affidavit reviewing the history of the cause as above set forth, and stating that the said judgment for costs had not been paid. On the 18th day of March, after a hearing of the motion, it was granted, and judgment entered dismissing the action. The plaintiff has appealed.

It is first assigned that the court erred in causing the order to be entered staying proceedings until the costs of the former action should be paid, in the absence of an order requiring the payment of such costs. The motion upon which the order was based asked for an order requiring the payment of the costs as a condition precedent to the prosecution of the second action. The order stated that the motion was granted, and it also added that proceedings should be stayed until the costs were paid. The order was therefore, in effect, one requiring the payment of the costs. It is true no time was fixed within which payment should be made, but the motion to require the payment had been pending in the cause for more than two and one-half years, and the order could have been no surprise to appellant in view of the decisions of this court in similar cases. *Schwede v. Hemrich,* 29 Wash. 124, 69 Pac. 643; *Plumley v. Simpson,* 31 Wash. 147, 71 Pac. 710.

If, therefore, appellant could not pay the costs at once, he was at least under obligations to pay within a reasonable time if he desired to further prosecute the second action. He as-

signs as error that on the 14th day after the order staying proceedings, the court dismissed the action for want of diligent prosecution. The record does not disclose that any showing was made to the court that appellant could not have paid the costs, or that for any reason the time that had elapsed was insufficient. The motion to dismiss also reached to failure in all matters of diligence to prosecute, and not alone to failure to pay the costs. The court was advised that this, a second action, had been pending for more than two and one-half years, and that appellant had of his own initiative taken no steps within all that time to forward the prosecution of the case. Such facts were proper to consider in connection with the failure to pay costs, and upon all the facts taken together, we think the court was justified in dismissing the action. While it is true the respondent could have taken steps to forward the action, yet the suit having been brought by appellant, the duty was particularly upon him to see that diligence was exercised. In *Langford v. Murphey,* 30 Wash. 499, 70 Pac. 1112, we said:

"Nor do we think that the fact that the statute permits the defendant to bring a case on to hearing deprives the court of its unquestioned common-law, if not inherent, power to clear its dockets of abandoned or stale actions."

See, also, *First Nat. Bank v. Hunt,* 40 Wash. 190, 82 Pac. 285. We shall therefore not interfere with the discretion of the trial court in dismissing the action, under all the circumstances. The judgment is affirmed.

MOUNT, C. J., FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5866. Decided March 23, 1906.]

CLAY ALLEN, *as Receiver of the De Soto Placer Mining Company, Respondent,* v. MARION B. BAXTER *et al., Appellants.*[1]

APPEAL—RECORD—REVIEW—AFFIDAVITS NOT BROUGHT UP. An assignment of error in denying a motion for a change of venue will not be considered by the supreme court when the affidavits used at the hearing are not brought up by a bill of exceptions or statement of facts.

PLEADING—APPOINTMENT OF RECEIVER—OBJECTION TO GENERAL ALLEGATIONS. In an action by a receiver, an objection that the allegations of the complaint as to the appointment of a receiver are not sufficiently specific cannot be raised by demurrer.

RECEIVERS—ACTIONS—LEAVE OF COURT. In an action by a receiver it is not necessary to allege leave of court to bring the action.

CORPORATIONS — INSOLVENCY — ACTION BY RECEIVER — CREDITOR'S KNOWLEDGE OF INSOLVENCY—SETTING ASIDE EXECUTION. In an action by a receiver of an insolvent corporation to set aside an attachment and execution in favor of a creditor, it is not necessary to allege that the creditor knew the corporation to be insolvent at the time of the commencement of the action, where the corporation was in fact insolvent at the time the attachment was sued out; since its assets thus became a trust fund for creditors.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 22, 1905, upon sustaining a demurrer to the defendants' answer, setting aside an attachment and execution levy in favor of a creditor, at the suit of the receiver of an insolvent corporation. Affirmed.

I. D. McCutcheon, for appellants.

Byers & Byers (Clay Allen, of counsel), for respondent.

MOUNT, C. J.—This action was brought in Snohomish county. The complaint, omitting formal parts, is as follows:

"(1) That the DeSoto Placer Mining Company is a foreign corporation, organized under the laws of the state of

[1]Reported in 85 Pac. 26.

West Virginia, and authorized to transact business in the state of Washington. (2) That during all the times hereinafter mentioned and until the appointment of a receiver, the said corporation was maintaining an office in the city of Seattle, King county, Washington, where service could be had upon said corporation. (3) That on the 29th day of March, 1904, the said Marion B. Baxter filed her complaint in this court against the DeSoto Placer Mining Company as defendant, which said action is docketed and numbered as No. 42347, wherein she sought to recover from the said defendant for services rendered the sum of $3,000. (4) That afterwards, to wit, on March 30, 1904, a writ of attachment against the certain property of the DeSoto Placer Mining Company hereinafter described was sued out, issued and directed to the said Frank P. Brewer, sheriff of Snohomish county, Washington, for service; that the said Frank P. Brewer, as sheriff of Snohomish county, made service of said writ of attachment by filing the same with the auditor of said county; that the said DeSoto Placer Mining Company entered its appearance by general denial in said action. (5) That afterwards, to wit, on the 20th day of October, 1904, judgment was rendered in favor of the said Marion B. Baxter and against said DeSoto Placer Mining Company in the sum of $3,000, with interest. (6) That on the 20th day of October, 1904, a writ of execution against the property hereinafter described was issued out of this court, and directed to the said Frank P. Brewer, as sheriff of Snohomish county, for execution, and service of said writ was made by filing the same with the auditor of said county. (7) That on the 23d day of July, 1904, one Arthur G. Mather was regularly appointed as receiver for all the property and assets of the DeSoto Placer Mining Company, in an action wherein one Louis L. Lang was plaintiff and the DeSoto Placer Mining Company was defendant. (8) That afterwards, to wit, on the —— day of November, 1904, the said Arthur G. Mather was, at his own request, removed as said receiver, and the plaintiff herein was, on the 16th day of November, 1904, by order of the Hon. George E. Morris, judge of the said superior court of King county, Washington, appointed as receiver of the property and assets of the DeSoto Placer Mining Company. (9) That the said receiver before bringing his action in this court has filed his oath and been

regularly qualified as such receiver. (10) That at the time of the filing of the suit of the said Marion B. Baxter against the DeSoto Placer Mining Company, and at the time of the issue and service of the writ of attachment thereunder, and at the time of the issue and service of the writ of execution, and the judgment obtained in said suit, the DeSoto Placer Mining Company was wholly insolvent. (11) That prior to all the dates hereinbefore mentioned, to wit, on or about the month of November in the year 1903, practically all of the real estate and personal property of the said company had been conveyed, transferred and leased to the said company. (12) That the debts and liabilities due from said company to its creditors at the time of the filing of the said Marion B. Baxter's complaint, aggregated approximately the sum of $90,000, and the property and assets at that time belonging to the said company did not exceed in value and does not now exceed in value the sum of $10,000, including the property hereinafter described. [Then follows a long list of real property and mining claims located in Snohomish county, Washington.] (13) That the said Frank P. Brewer, as sheriff of Snohomish county, is authorized to sell the property hereinbefore described in said writ of attachment under said execution. (14) That there is little or no property of said company available to pay the debts due the creditors of the company; that said Marion B. Baxter and the other defendant herein, should sale be made of the property hereinbefore described and proceeds thereof appropriated, the said Marion B. Baxter will receive approximately the full amount of her claim against the said company, while the other creditors herein will take nothing.

"Wherefore the plaintiff prays that the claim of said Marion B. Baxter be declared a general claim against said corporation; that the levy under the writ of attachment and the levy of the writ of execution sued out by these defendants be dissolved and set aside; that the property herein be given into the control of the receiver as an asset of said corporation.'

The defendants appeared in the action and filed a general demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. At the same time, the defendants demanded a change of venue to

King county, upon the ground that the principal defendant resided in King county, and that all of the defendants' witnesses resided in King county. This motion was heard and denied on January 31, 1905. Thereafter the demurrer was heard, and on June 22, 1905, was overruled. Defendants elected to stand on their demurrer, and a judgment was entered as prayed for in the complaint. The defendants appeal, alleging (1) that the court erred in denying the demand for a change of the place of trial; (2) in overruling the demurrer.

No statement of facts or bill of exceptions is brought here under certificate of the trial judge. Several affidavits for and against the demand for a change of the place of trial are embodied in the transcript, which is certified by the clerk as being "a full, true and correct copy of so much of the records and files as the appellant deems material to a review of the matters embraced in this appeal." Respondent moves to strike all these affidavits, for the reason that they have not been incorporated in the record by a statement of facts or bill of exceptions. This motion must be sustained. We have often and uniformly held that we will not review questions of fact presented to the lower court, unless all the material facts presented to the trial court are brought here by bill of exceptions or statement of facts properly certified by the trial judge. *State v. Humason,* 5 Wash. 499, 32 Pac. 111; *Clay v. Selah Valley Irr. Co.,* 14 Wash. 543, 45 Pac. 141; *Jacobson v. Lunn,* 16 Wash. 487, 48 Pac. 237; *Chevalier & Co. v. Wilson,* 30 Wash. 227, 70 Pac. 487; *Soder v. Adams Hardware Co.,* 38 Wash. 607, 80 Pac. 775.

Appellant argues that the complaint is not sufficient, because it does not allege that the respondent was the duly qualified and acting receiver at the time the action was begun; that the mere allegation that he was appointed and qualified is not sufficient; that the complaint fails to show in what case or court the respondent was appointed receiver. It is sufficient to say of these objections that they are not such as

can be raseid by demurrer under our code practice. They might have been raised by a proper motion, but not by demurrer. In *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976, this court, quoting from an earlier territorial case, said:

"A suitor is no longer to be turned out of court, if by making all reasonable intendments in his favor enough can be seized hold of in his pleadings to show that he has rights which ought to be enforced. He may be required on motion to conform his statement to the rules of good pleading, and if he refuse, may be turned out of court; but as against a demurrer, the office of which is to raise a substantial issue on the law of the case, and not on the law of practice and pleading, evidentiary facts, and even inferences from averments amounting to mere conclusions of law will be considered in his favor."

Appellants contend further that the complaint is insufficient, because it does not show that the receiver has obtained leave of court to bring the action. This court held otherwise in *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138, and *Compton v. Schwabacher Bros. & Co.*, 15 Wash. 306, 46 Pac. 338. Appellants also contend that the complaint is insufficient, because it contains no allegation that the appellants knew that the corporation was insolvent at the time the attachment was sued out. We think this is not necessary. If, as a matter of fact, the corporation was insolvent at the time of the levy of the writ, the funds of the corporation were trust funds for the benefit of the creditors thereof. *Compton v. Schwabacher Bros. & Co., supra; Washington Liquor Co. v. Alladio Cafe Co.*, 28 Wash. 176, 68 Pac. 444; *State ex rel. Krisch v. Superior Court*, 36 Wash. 91, 78 Pac. 461. As against a general demurrer, it will be presumed that appellants had knowledge of the fact.

The court properly overruled the demurrer, and the judgment is therefore affirmed.

ROOT, DUNBAR, CROW, FULLERTON, and HADLEY, JJ., concur.

[No. 5988. Decided March 24, 1906.]

The State of Washington, *on the Relation of Marguerite H. Smith, Plaintiff,* v. E. W. Ross, *as Commissioner of Public Lands, Defendant.*[1]

Mandamus—To State Officers—Lease of Tide Lands—Reinstatement. Mandamus will lie to compel the commissioner of public lands to reinstate a lease and accept rent; since, under Bal. Code, §§ 2149-2155, the right of appeal is given only from decisions of the state board of land commissioners and not from orders of the commissioner.

Public Lands—Lease—Forfeiture—Notice by Mail—Statutes—Construction. Under Bal. Code, § 2155, requiring the commissioner of public lands to cause notice to be served on the lessees of public lands who may become delinquent within sixty days, and if no response be had, to declare a forfeiture of the lease, notice may be given by mail, in view of the burden and impracticability of personal service on all state lessees, and of the settled practice of the office to make service by mail.

Same—Failure of Notice—Cancellation of Lease. Where the notice of delinquency mailed by the state land commissioner to a lessee of state lands fails to reach the lessee and is returned unopened, the commissioner has no authority to cancel the lease for nonpayment of rent; and a lessee paying within sixty days after a second notice is entitled to a reinstatement of a lease cancelled for nonpayment of rent.

Application filed in the supreme court December 12, 1905, for a writ of mandate to the state land commissioner to compel the reinstatement of a lease of public lands. Writ granted.

Harold Preston and *E. H. Guie*, for relator.

The Attorney General, and *A. J. Falknor, Assistant*, for defendant.

Crow, J.—This is an original application made to this court for a writ of mandamus to compel the defendant, as

[1]Reported in 85 Pac. 29.

State Land Commissioner, to reinstate a certain lease of tide lands, and accept the rent due thereon.

The relator alleges that on November 1, 1899, the state of Washington, by and through its then duly qualified and acting commissioner of public lands, executed and delivered to one V. Hugo Smith, the husband of relator, lease No. 311, for the period of thirty years, for certain tide lands of the first class in Seattle, King county, Washington; that on November 1, 1899, said V. Hugo Smith paid the sum of $24 rent on said lease for the first year of the term thereof, and paid the further sum of $24 each year in advance for the years commencing November 1, 1900, November 1, 1901, November 1, 1902, and November 1, 1903; that on the 10th day of February, 1903, said V. Hugo Smith assigned said lease to the relator; that said assignment was approved by the commissioner of public lands, and that the relator is now the owner of said lease as her separate property; that the relator believed the rent due on November 1, 1904, had been paid; that no notice as required by law was ever served upon her notifying her that said rent was due or would become delinquent, or that said lease would be forfeited for nonpayment, nor was any notice sent to the relator until November 10, 1905, when the defendant mailed a statement to the relator that rent was due for the years beginning November 1, 1904, and November 1, 1905; that said notice was received by the relator on November 15, 1905, who immediately caused said V. Hugo Smith to pay the defendant, as such commissioner, on November 17, 1905, the rent for said two years, amounting to $48, which said commissioner received; that on or about November 24, 1905, the relator for the first time learned said lease was marked cancelled under date of November 9, 1905, on the records of defendant's office; that at all times the relator has been acting in good faith, and that if the rent due on November 1, 1904, was not paid until November 17, 1905, it was through inadvertence

and for want of the notice required by law; that on December 6, 1905, the defendant attempted to return said rental, which the relator refused to receive; that on December 8, 1905, the relator demanded that said lease be reinstated, but that defendant then refused, and still refuses, to reinstate the same.

The defendant, commissioner of public lands, has demurred to said affidavit, and has also filed an answer in which he alleges that on November 16, 1904, there was mailed to said lessee by the defendant's predecessor in office a notice that $24 rent had become due on said lease on November 1, 1904, and that if the same was not paid within sixty days after due, said lease would be cancelled; that said notice was enclosed in an envelope, postage prepaid, addressed to Marguerite H. Smith, Colonial Block, Seattle, Wash., care of V. H. Smith, and was deposited in the United States post-office at Olympia, Wash.; that on or about said date said Marguerite H. Smith left the city of Seattle to visit the St. Louis exposition, leaving instructions for her mail to be forwarded to the Inside Inn, at St. Louis, Mo.; that said letter was so forwarded; that she failed to call for the same at the Inn; that said letter was returned unopened to said S. A. Callvert, land commissioner, and was filed away and preserved in the records of his office; that afterwards, and while defendant was preparing his answer herein, an investigation of the files of his office disclosed that said letter containing said notice had been returned, and said original notice and envelope are attached to the answer herein; that said notice of November 10, 1905, mentioned in the affidavit as having been sent out by defendant was sent through inadvertence and without authority, by a clerk in defendant's office, and after the cancellation of said lease had actually been ordered; that prior thereto, about November 1, 1905, defendant had directed the clerks in his office to prepare a list of all tide land leases upon which rentals were then due

and unpaid; that about November 7, 1905, said list was completed, and included said lease No. 311, showing two years rent past due; that on the morning of November 9, 1905, and not at any other time, the defendant, as commissioner of public lands, entered upon said list, in his own handwriting, the words: "Ordered cancelled, Nov. 9th, 1905, E. W. Ross, Com."; that thereafter defendant, as such commissioner, executed and entered in the records of his office an additional formal order cancelling said lease and many other leases; that afterwards, during the absence of the defendant from the city of Olympia, said V. Hugo Smith, on or about November 17, 1905, appeared at defendant's office and tendered $104 in attempted payment of rental on certain tide land leases, including said lease No. 311; that said money was not received by defendant's clerks in payment of rental, nor was the retention thereof so considered, as said lease had been cancelled, but said money was held awaiting the defendant's return and his order as to its disposition; that on December 6, 1905, defendant promptly addressed a letter to said V. Hugo Smith, and enclosing a draft for $104, returned said deposit, and notified him of the cancellation of said lease; that said Smith returned said draft, which is now in the defendant's possession, but is not held for payment of rentals.

By his demurrer, the defendant contends that this court has no jurisdiction of this proceeding, as the relator has a remedy by appealing to the superior court from the decision or action of the commissioner of public lands, citing § 1, chap. 62, Laws 1901, p. 98. Said section provides for an appeal from orders or decisions of the board of state land commissioners, but makes no reference to orders made by the commissioner of public lands. The defendant contends that, in drawing this appeal act of 1901, the legislature must have inadvertently overlooked the fact that in some instances actions therein contemplated are taken by the commissioner

of public lands alone, instead of the board; that it must have intended to allow an appeal to any one who was an applicant for a lease, or who was aggrieved by any action upon his lease; and that unless the statute be so construed as to give the right of appeal in such matters, whether or not the board or the commissioner made the order, the statute itself would become meaningless and not as broad as the legislature intended.

We do not think this contention can be sustained. At the time the act of 1901 was passed, Bal. Code, §§ 2149-2155, provided for the leasing of lands, and the forfeiture of leases by the commissioner of public lands, and 3 Bal. Code, § 2180, (Laws 1899, p. 139), provided that tide and shore lands might be leased in the same manner. The legislature, when providing for an appeal by the act of 1901, must be presumed to have known that the commissioner of public lands had authority to make and forfeit leases. If it intended to provide for an appeal from his order or decision it would certainly have so stated. For us to hold such a right of appeal to have been given, would be judicial legislation, as we would without authority or necessity be reading into the act words which were not placed there or intended by the legislature. The relator having no right of appeal, this court has jurisdiction, as mandamus will lie to compel the commissioner of public lands to reinstate a lease and accept rent. *State ex rel. Bussell v. Callvert,* 33 Wash. 380, 74 Pac. 573.

The relator, citing Bal. Code, § 2155, contends: (1) That before a lease can be forfeited notice of delinquency must be personally served upon a lessee, and that said notice cannot be served by mail; (2) that no notice of default of the rent due November 1, 1904, having been served upon the relator, either personally or by mail, the defendant had no authority to cancel her lease. Section 2155 of Bal. Code reads as follows:

"The commissioner of public lands shall keep a full and complete record of all leases so issued and payments made

thereon, and on the first of each and every month the commissioner of public lands shall cause notice to be served on lessees of public lands who may become delinquent on annual payment within sixty days, and therefore subject to forfeiture, and the commissioner shall forthwith, if no response be had, declare a forfeiture of the lease, and may eject the lessee therefrom."

This section is somewhat ambiguous, and its construction is not without difficulty, but after careful consideration we have concluded that it imposes a duty upon the commissioner of public lands to make an examination of the records of leases in his office on the first of each month for the purpose of ascertaining all leases upon which annual installments of rent will become due within the next succeeding sixty days, and to immediately give written notice thereof to the holders of all such leases. According to this construction, it would be his duty to give such notice before any default could occur, and without regard to the probability or improbability that one might or might not occur. This being true, we cannot hold that such notices must be served personally. The office of the state land commissioner is one of the most important departments of the state government, and it is common knowledge that it has issued thousands of leases for various classes of state lands. To hold that the legislature intended to impose upon the land commissioner the burdensome duty of causing a written notice to be personally served upon each and every lessee at least once a year would be unreasonable. We think the notice mentioned is intended to be in the nature of a reminder to the lessee, calling his attention to the installment of rent about to mature, and the liability of his lease to forfeiture, so that no default may occur, and that no other notice is required as a condition precedent to such forfeiture in the event of nonpayment of the rent within the time contemplated by the statute and fixed by the lease. Ordinarily where a statute requires the giving of notice, and there is nothing in the context of the law, or in the circum-

stances of the case, to show that any other notice was intended, the courts hold that personal notice must be given. 21 Am. & Eng. Ency. Law (2d ed.), p. 583; Wade, Law of Notice (2d ed.), § 1334. We think, however, that the peculiar character of this statute, its context, its use of the word "response," and all the circumstances, show it not to have been the intention of the legislature to require personal service on all of these lessees, whether in default or not. It inferentially appears, both from the affidavit of the relator and the answer of the defendant, and in fact may be taken as conceded, that for years the universal practice of the commissioners of public lands has been to serve these notices by mail. It is common knowledge that this custom has prevailed ever since said section was originally enacted in 1895. Laws 1895, p. 546. It was amended and re-enacted, without any substantial change in the matter of notice in 1897. Laws 1897, p. 244. Sutherland, in the second edition of his work on Statutory Construction, at section 474, says:

"The practical construction given to a doubtful statute by the department or officers whose duty it is to carry it into execution is entitled to great weight and will not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous. Says the supreme court of Oregon: 'In all cases where those persons whose duty it is to execute a law have uniformily given it a particular construction, and that construction has been acquiesced in and acted upon for a long time, it is a contemporary exposition of the statute, which always commands the attention of the courts, and will be followed unless it clearly and manifestly appears to be wrong.' The legislature is presumed to be cognizant of such construction, and after long continuance, without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction. And where the statute is re-enacted without change the presumption is strong that the legislature intended it to bear the same construction that had previously been given it."

We think service of notice by mail is a sufficient compliance with said section, for the further reason that where it has been addressed to the lessee in a sealed envelope, postage prepaid, with a return direction, and has been deposited in the United States postoffice and not returned to the sender, a strong presumption arises that it actually reached the person to whom it was addressed, and gave the notice intended. The relator's lease contains the following stipulation:

"The payment of the above mentioned annual rent to the Commissioner of Public Lands of the State of Washington yearly in advance is of the essence of this contract, and the same shall be, and is, a condition precedent to the execution and continuance of this lease or any rights thereunder, and if said annual rent shall not be paid within sixty days from the date due upon notice served by the Commissioner of Public Lands, this lease shall be null and void."

It will be noticed that under the provisions of Bal. Code, § 2154, all leases are to be drawn on a form prescribed by the attorney general. The form of this lease, the uniform practice of the land commissioner's office, the universal acquiescence on the part of the lessees all over the state and the above history of legislation, all appear consistent with our interpretation of said section 2155, Bal. Code. We therefore hold that the notice mentioned therein may be served by mail, and that under the provisions of said section, and the terms of the lease, if the annual rent be not paid after the service of such notice and within sixty days after due, the commissioner of public lands is authorized to declare a forfeiture without further notice.

Relator further contends that even though notice served by mail be a sufficient compliance with the provisions of said section 2155, nevertheless the commissioner of public lands had no authority to forfeit her lease, for the reason that no such service was made giving notice of the installment of rent falling due November 1, 1904. If by oversight or inadvertence the commissioner of public lands should fail or

neglect to mail the notice contemplated by said section in accordance with our interpretation, it would, upon discovery of such neglect, become his duty to mail the notice as soon thereafter as possible or practicable, as a condition precedent to a forfeiture. In this instance it is shown that a notice was mailed in November, 1904, but it also affirmatively appears from the defendant's answer that this notice did not reach the relator, but was returned unopened, and that it was not discovered by the present commissioner until after the commencement of this proceeding. The facts here disclosed show that the attempt to give notice by mail resulted in failure. The relator therefore is placed in the same position she would have occupied had no such notice been given or attempted. This being true, the defendant had no authority to forfeit her lease, payment having been actually made within sixty days after the mailing of the second notice in November, 1905. The relator having immediately proceeded by mandamus, is entitled to have her lease reinstated and her rent received by the defendant. The defendant, in good faith relying upon the records of his office, which showed notice to have been given in November, 1904, attempted the cancellation of this lease, and did so before the rent was paid in 1905. When he made this attempted cancellation he seemed to be justified in his belief that the notice required had been given in 1904. The fact that the first notice mailed by his predecessor in office did not reach the relator did not come to his actual knowledge until the time for the preparation of his answer had arrived. Thereupon he fairly and honestly presented in his answer a full, complete and exact history of this case to this court. Upon the conceded facts, we think he was without authority to cancel the lease.

It is therefore ordered that the writ prayed for be issued.

MOUNT, C. J., ROOT, DUNBAR, and HADLEY, JJ., concur.

[No. 5819. Decided March 26, 1906.]

J. E. HAMMEL, *Respondent*, v. FIDELITY MUTUAL AID ASSOCIATION, *Appellant*.[1]

PROCESS — SERVICE ON FOREIGN CORPORATIONS — VENUE — JURISDICTION OF SUBJECT-MATTER. Under Bal. Code, § 4854, the superior court has no jurisdiction of the subject-matter of an action against a foreign corporation commenced in a county wherein the company has no agent, by service upon a statutory agent in another county.

APPEARANCE — WAIVER OF OBJECTIONS — JURISDICTION OF SUBJECT-MATTER. A general appearance for the purpose of dismissing an action against a foreign corporation of which the court has no jurisdiction of the subject-matter does not confer jurisdiction or waive the objection.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered January 7, 1905, upon findings in favor of the plaintiff after a trial before the court without a jury, in an action upon a policy of accident insurance. Reversed.

H. T. Granger, for appellant.

Coleman & Fogarty, for respondent.

HADLEY, J.—This action was brought upon an accident insurance policy, and the suit was instituted in Snohomish county. The defendant is a foreign corporation, organized under the laws of the state of California. The summons was personally served upon C. G. Heifner, the statutory agent of the defendant, and was served in King county. The defendant interposed a motion to dismiss the cause on the ground, that it is a foreign corporation, duly authorized to do business in this state; that, at the time of the service of the summons, it had no office for the transaction of business in Snohomish county; that no person resided in said county upon whom process against defendant might be served; and that

[1]Reported in 85 Pac. 35.

the court was therefore without jurisdiction. The motion was supported by affidavit, which stated that, at the time of the service upon Mr. Heifner, a statutory agent of defendant, he was, and for a long time prior thereto had been, continuously a resident of Seattle, King county, and that he was then such resident. The grounds stated in the motion were otherwise fully sustained by affidavit, and the facts so stated were not controverted. The motion to dismiss was overruled, and the defendant having answered, a trial was had before the court without a jury, resulting in a judgment for plaintiff. The defendant has appealed.

It is assigned that the court erred in overruling appellant's motion to dismiss the action on the ground that the court was without jurisdiction. It is not disputed that appellant had no office in Snohomish county for the transaction of business, and that there was no person in that county upon whom process against appellant could be served. It is also conceded that the service which was made was made upon appellant's statutory agent, who at all times resided in King county. Under the decision in *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 670, the trial court was without jurisdiction to determine the cause and render judgment upon the merits. In the case cited, the service was upon the statutory agent of a foreign corporation, the agent residing in Clarke county, in which county the service was made. The suit was brought and tried in Garfield county. After a discussion of the statutes, it was held by this court that the court in Garfield county was without jurisdiction to pronounce judgment, and that the judgment and all the proceedings in that court were without authority and void. It was held that the legislature has provided that actions against corporations shall be brought in a county where the corporation has an office for the transaction of business, or where some person resides upon whom process may be served against such corporation. Bal. Code, § 4854. In the case at bar, the appel-

lant had no office for the transaction of business in Snohomish county, and there was no soliciting agent of appellant or other person residing in that county upon whom process might be served against appellant. Respondent concedes that the cited case supports appellant's contention, but argues that this court has modified the doctrine of that case.

State ex rel. State Ins. Co. v. Superior Court, 14 Wash. 203, 44 Pac. 131, is cited. In that case the action was brought in Pierce county, and a service of summons was made upon the statutory agent who resided in Thurston county. Reference was made to our statute which authorizes service of summons in actions against insurance companies to be made upon any agent authorized by such a company to solicit insurance within this state. Bal. Code, § 4875. It was then stated that, if the relator in the case had an agent authorized to solicit insurance residing in Pierce county, the superior court of that county had jurisdiction by virtue of the statute which authorizes an action to be brought against a corporation in any county where any person resides upon whom service of process may be served. As there was nothing in the record to negative the fact that such an agent did reside in Pierce county, it was presumed, in favor of the regularity of the proceedings, that the necessary facts existed which authorized the court to assert its jurisdiction. We find nothing in that case which modifies the doctrine of *McMaster v. Thresher Co., supra.* In the case at bar, it is affirmatively shown that there was neither an office of appellant for the transaction of business in Snohomish county, nor any agent or person residing in that county upon whom service against the appellant could be made. Therefore no presumption to the contrary can be indulged, as was properly done in *State ex rel. State Ins. Co. v. Superior Court, supra.*

Respondent also cites *Sievers v. Dalles etc. Nav. Co.,* 24 Wash. 302, 64 Pac. 539. It was simply held in that case that service against a corporation was sufficient when made upon a purser who also had charge of a wharf of the corpora-

tion, the maintenance of the wharf being held to be an office for the transaction of business. *Zindorf v. Western American Co.*, 26 Wash. 695, 67 Pac. 355, is also cited by respondent, but we find nothing therein which modifies the doctrine of the *McMaster* case. It is true, the opinion states that we do not care to extend the doctrine of the *McMaster* case, but the rule was not modified, and it stands as the rule at this time. We see no reason for modifying or limiting the rule of that case, since we think it clearly announces just what the legislature has declared shall be the rule. That rule is that a corporation can be sued only in a county where it has an office for the transaction of business, or where some person resides upon whom process may be served against the corporation.

Respondent, however, contends that appellant has waived the matter of jurisdiction by not limiting its appearance to a special one. Under the statute, the court had no jurisdiction of the subject-matter. The conditions which the statute says are necessary to confer jurisdiction of such a suit in any county did not exist in Snohomish county. The action is by the statute made a local one, to be brought only in counties where certain specified conditions exist. The court, therefore, had no more jurisdiction of the subject-matter of the action than it would have of an action to foreclose a mortgage upon real estate wholly situate in another county. It is an elementary principle that neither an appearance nor consent of the parties will confer jurisdiction of the subject-matter, but such jurisdiction is derived wholly from the statutes. The court was therefore without power to determine the action upon its merits, notwithstanding the appearance was general in form.

The judgment is reversed, and the cause remanded, with instructions to vacate the judgment and dismiss the action.

MOUNT, C. J., ROOT, FULLERTON, CROW, and DUNBAR, JJ., concur.

[No. 5940. Decided March 26, 1906.]

JOHN SERVICE, *Appellant*, v. A. F. McMAHON *et al.*, *Respondents*.[1]

LIMITATION OF ACTIONS — COMMENCEMENT — FORECLOSURE OF MECHANICS' LIEN. Bal. Code, § 4807, providing that an action shall be deemed commenced when the complaint is filed, applies to the commencement of an action to foreclose a mechanics' lien, which is accordingly barred if the complaint is not filed within eight months after the filing of the lien.

MECHANICS' LIEN—FORECLOSURE—DISMISSAL—RIGHT TO PERSONAL JUDGMENT—WAIVER. In an action to foreclose a mechanics' lien which is not commenced within the eight months limited by law for the commencement of such actions, the plaintiff cannot complain of a general judgment of dismissal of the action, when no request was made to preserve the plaintiff's right to a personal judgment, but an unconditional judgment of dismissal was invited, preserving only his right of appeal.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 29, 1905, dismissing an action to foreclose a mechanics' lien, upon sustaining a demurrer to the complaint. Affirmed.

Pence & Rhodes, C. G. Pence, Harry A. Rhodes, and *M. F. Mendenhall,* for appellant.

Barnhart, Laughon & Pugh, for respondents.

HADLEY, J.—This action was brought to foreclose a lien for lumber and material furnished in the construction of a building. The complaint alleges that the lien notice was filed for record on May 25, 1904. The complaint was not filed until January 30, 1905. Demurrer to the complaint was interposed on several grounds, and among them that the action was not commenced within the time limited by law. The demurrer was sustained and the plaintiff having refused to plead further, judgment was entered dismissing the action. The plaintiff has appealed.

[1]Reported in 85 Pac. 33.

Several questions are discussed as being involved in the ruling on the demurrer. But we think that the question raised as to the statute of limitations is decisive of the case. An affidavit in the record shows service of the complaint and summons upon some of the defendants within eight months of the filing of the lien notice; but the complaint was not filed until after eight months had expired. Bal. Code, § 5908, provides that no lien of the class sought to be enforced here shall bind the property subject to the lien for a longer period than eight calendar months, after the claim has been filed, unless an action be commenced in the proper court within that time to enforce such lien. Appellant contends that the service of the summons and complaint upon some of the defendants was a commencement of the action within the meaning of the statute. Reference is made to the general practice act, Bal. Code, § 4869, in support of appellant's view that service of the summons was a commencement of the action as is contemplated by the lien limitation statute. Turning, however, to the statute on the general subject of limitations, we find that Bal. Code, § 4807, provides that "an action shall be deemed commenced when the complaint is filed." It was held in *Cresswell v. Spokane County,* 30 Wash. 620, 71 Pac. 195, that under said statute no matter how or when actions may be commenced for other purposes, yet in order to escape the statute of limitations, the complaint must be filed within the prescribed limitation period. Appellant argues that the case cited dealt only with the general statute of limitations, and that the section from which we have quoted is a part of the chapter on that general subject, but that the provision as to limitation of actions to foreclose liens is found in another chapter pertaining to another subject. While that is true, yet we are unable to distinguish the cited case in principle from the one at bar. Bal. Code, § 4796, is also a part of the chapter on the general subject of limitations, and that section provides that actions can only be commenced within

the periods in said chapter prescribed, "except when in special cases a different limitation is prescribed by statute." It is thus recognized that there may be special limitations provided other than those prescribed in that chapter, and that the same rules of practice shall apply to them. Such special cases are thus brought under the general scheme of limitation procedure. Section 5908, *supra,* provides such a special limitation of eight months. It is essentially a statute of limitations, and must therefore be controlled by the same rules of practice with reference to the commencement of actions as though it were included in the general chapter on that subject. *Cresswell v. Spokane County, supra,* is therefore decisive against appellant's contention.

It is further urged that, even though the right to enforce the lien is barred, the court nevertheless erred in dismissing the action, for the reason that appellant is at least entitled to a personal judgment as prayed in the complaint. The record is in a peculiar condition as bearing upon the action of the court in that regard. An order was entered sustaining the demurrer, and afterwards appellant himself filed the following motion in the case:

"Comes now the plaintiff herein and respectfully shows this honorable court that heretofore in this cause this court sustained defendants' demurrer to plaintiff's complaint, and since that time no further order has been made in said cause, and the defendants have not filed their judgment. That in order for plaintiff to perfect his appeal, it will be necessary for this court to make an order dismissing said cause. Wherefore plaintiff moves this court for an order dismissing said above entitled cause without prejudice to plaintiff's right to appeal herein."

The above motion appears to have been filed July 30, but the judgment of dismissal as shown by the record was filed July 29. We are unable to account for this inconsistency. It is possible that appellant was not advised that the judgment had been filed when he filed his motion asking for the

dismissal. The fact is, however, that appellant's written request was filed, asking for the judgment that was rendered, in order that he might appeal. It nowhere appears that he requested the court to preserve his right to have a personal judgment, notwithstanding the failure of the lien, but he unconditionally invited the general judgment of dismissal. He is therefore not in position to ask a reversal in order that he may now have a personal judgment in this action.

The judgment is affirmed.

MOUNT, C. J., ROOT, FULLERTON, CROW, and DUNBAR, JJ., concur.

[No. 6000. Decided March 26, 1906.]

THE STATE OF WASHINGTON, *Respondent,* v. JOE BUTTS, *Appellant.*[1]

CRIMINAL LAW—LARCENY—INFORMATION—DUPLICITY. An information charging the larceny of fence posts upon a certain day, part of which belonged to one person and part to another, is not subject to demurrer for duplicity, where the natural inference from the language used is that they were all taken and carried away at the same time.

Appeal from a judgment of the superior court for Okanogan county, Steiner, J., entered August 26, 1905, upon a trial and conviction of the larceny of fence posts. Affirmed.

E. K. Pendergast and *Perry D. Smith,* for appellant.

Alvin W. Barry, for respondent.

ROOT, J.—Appellant was prosecuted jointly with one Cossalman, upon an information charging grand larceny, alleged to have been committed as follows:

"The said William Cossalman and Joe Butts, on or about the 15th day of March, 1905, in the county of Okanogan aforesaid, then and there being, did then and there feloni-

[1]Reported in 85 Pac. 33.

ously steal, take and carry away three hundred and fifty fence posts, each of said posts of the value of twelve cents and of the aggregate value of forty-two dollars, 250 of said posts of the goods and chattels of one J. D. Boone, and 100 or thereabouts of said posts of the goods and chattels of one A. M. Polk, contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the people of the state of Washington.

To this information appellant interposed a demurrer, on the following three grounds, to wit:

"(1) That said information does not substantially conform to the requirements of the code of the state of Washington and does not substantially conform to the laws of the state of Washington. (2) That the facts charged in said information do not constitute a crime. (3) That the facts charged in said information do not constitute a crime, misdemeanor nor any offense against the laws of the state of Washington."

Said demurrer was overruled. A trial resulted in the acquittal of Cossalman and a conviction of appellant of petit larceny. The latter prosecutes this appeal. He urges that his demurrer should have been sustained for the reason that the information charges two offenses, inasmuch as the stolen posts are alleged to have belonged partly to one J. D. Boone, and the other part to one A. M. Polk, and that it does not appear that they were taken at the same time. Respondent urges that the demurrer does not raise this question. Bal. Code, § 6896, states the grounds upon which a demurrer may be interposed to an indictment or information. The first three grounds are as follows: "(1) That it does not substantially conform to the requirements of this code; (2) that more than one crime is charged; (3) that the facts charged do not constitute a crime." Respondent maintains that the objection here urged by appellant could be raised only upon a demurrer expressly assigning the ground of the second subdivision of said statute, to wit: "That more than one crime is charged." We will not pass upon this question for the

reason that we do not believe that the information is subject to the charge of duplicity. The offense is alleged therein to have been committed on a certain day. It is charged that the defendants "then and there being, did then and there feloniously steal, take, and carry away," etc. We think the natural and legitimate inference to be drawn from this language is that all of these posts were so stolen and carried away at the same time, constituting but one transaction. This being true, it would constitute but one offense, even though the ownership of the posts might have been in different persons. The demurrer was properly overruled. *State v. Clark* (Ore.), 80 Pac. 101; Rapalje, Larceny, § 117; *People v. Johnson,* 81 Mich. 573, 45 N. W. 1119; *State v. Nelson,* 29 Me. 329; *Fulmer v. Commonwealth,* 97 Pa. St. 503; *State v. Hennessey,* 23 Ohio St. 339; *Ben v. State,* 22 Ala. 9.

The judgment of the superior court is affirmed.

MOUNT, C. J., CROW, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

[No. 6021. Decided March 27, 1906.]

EDNA GRAVELLE *et al., Appellants,* v. THE CANADIAN AND AMERICAN MORTGAGE & TRUST COMPANY, LIMITED, *Respondent.*[1]

PROCESS—DESCRIPTION OF PARTY—CHRISTIAN NAME. Service of a summons and complaint upon a minor heir, described as an infant daughter without specifying her Christian name, is valid when it appears from the record that she was the only daughter to whom the summons could refer and the service was properly made upon her.

MORTGAGES — FORECLOSURE — INFANTS — FAILURE OF GUARDIAN AD LITEM TO ANSWER. A decree of foreclosure of a mortgage is not void as to a minor heir because of the failure of her guardian *ad litem* to file an answer, where he appeared by filing his acceptance of the appointment, proofs were taken, and sufficient facts appear to warrant the decree, in the absence of an affirmative defense.

[1]Reported in 85 Pac. 36.

MORTGAGES—VOID FORECLOSURE—MORTGAGEE IN POSSESSION—REDEMPTION—DECREE—INFANTS. In an action to recover possession of premises from the successor in interest of a mortgagee in possession under a void foreclosure sale, in which the defendants set up the mortgage and asked its foreclosure, it is proper to decree the payment of the sum due less rents and profits, with a right in the plaintiff to redeem within ninety days; and the fact that the plaintiff is a minor is not in itself a sufficient reason for allowing a further time for redemption.

SAME—ATTORNEY'S FEES ON FORECLOSURE UNDER CROSS-COMPLAINT. In such an action, it is proper to allow the defendants a reasonable sum as attorney's fees, where the mortgage provided therefor, and the plaintiff did not recognize the mortgage but sought possession and partition, claiming as owner of an interest in the property.

Appeal from a judgment of the superior court for Lincoln county, Kennan, J., entered September 1, 1905, upon findings in favor of the defendant, decreeing the foreclosure of a mortgage upon its cross-complaint, in an action to recover the possession of mortgaged premises. Affirmed.

H. A. P. Myers, for appellants.

L. Davies and *Tolman & Kimball*, for respondent.

MOUNT, C. J.—The appellants are minors. They brought this action, claiming to be the owners each of an undivided one-third interest in the northwest quarter of section 34, township 25, N., R. 38, E., W. M., in Lincoln county, this state. The prayer of the complaint was for the possession of the property, for a partition thereof, and for an accounting for rents. There is no dispute in the facts, which are as follows: Joseph Gravelle, the father of the plaintiffs, owned the land in question during his lifetime. The land was his separate property. On March 7, 1890, while he was unmarried, he executed a mortgage on the land for $1,500. On May 23, 1894, the said Joseph Gravelle died intestate, leaving a wife and an infant daughter. In December, 1894, a son was born to the widow. These two children are the appellants herein. In 1895, the Canadian and American Mortgage & Trust Company, being the owner and holder of the

mortgage above referred to, brought an action to foreclose the said mortgage against the administrator of the estate, the widow and "——— Gravelle," alleging that the widow and minor daughter were the only heirs at law of Joseph Gravelle, deceased. Thereafter the guardian *ad litem* for ——— Gravelle was appointed by the court, and service of the summons and complaint was duly made upon the defendants in that action. The guardian *ad litem* accepted the appointment by filing a written statement to that effect, but made no other appearance in the action. None of the defendants appeared in the action, and the trial court found that the defendants had been duly and legally served with personal service and made default, and heard evidence of the facts alleged in the complaint, and a decree of foreclosure was thereupon entered. Subsequently the mortgaged property was sold and bid in by the plaintiffs in that action, and the sale was afterwards confirmed. The mortgage company went into possession of the premises, and thereafter sold the same to defendant in this action, Casper Helstab. Upon these facts the trial court found that Edna Gravelle was a party to the foreclosure action, and concluded thereby; but that the minor Joseph Gravelle was not a party thereto. The court also found, that, as to the minor Joseph's one-third interest, the defendants were mortgagees in possession; that there was still due on that interest the sum of $1,328.01, after deducting the rents and profits, and that said minor could redeem his interest by paying that sum within ninety days. In making up the amount due, the court allowed an attorney's fee of $83.33, for the foreclosure of the mortgage as against the minor. A decree was entered according to these findings, and the minors by their guardian prosecute this appeal.

Appellants contend that the finding that Edna Garvelle was served in the foreclosure suit, and that the decree was valid as to her, was error, (1) because she was served as

"———— Gravelle," and (2) because her guardian *ad litem* made no defense to the action. It is true the summons and complaint in the original foreclosure action referred to the infant daughter as "———— Gravelle." Her Christian name was not stated. Counsel says we are, therefore, left in the dark as to which of the minors was served or intended to be served. It appears, however, in the record of the foreclosure proceedings, that there was but one minor heir, a daughter, ———— Gravelle. She appears to have been regularly served, and there is no contention that she was not served, or even that there was another daughter. On the other hand, the record in this case discloses that there was but one daughter. The service is the important fact, and when it is shown that the proper person was served, that person cannot afterwards say that her Christian name was not stated, and thereby avoid the service. The court was, therefore, justified in finding that Edna Gravelle was served in the original action.

It is also true that the guardian *ad litem* filed no answer for his ward, but he appeared in the action by filing his acceptance of the appointment. The court appears to have had jurisdiction both of the person of the infant and of the property, and the infant appears to have been represented. Proof of the allegations of the complaint appears to have been made, and findings and a decree were subsequently entered. It was, no doubt, the duty of the guardian *ad litem* to have filed an answer denying generally the allegations of the complaint. But, if he had done so in this case, there were sufficient facts admitted to show that the mortgage company was entitled to a decree, in the absence of an affirmative defense. Under these circumstances the decree is not void, and in the absence of fraud or collusion the decree is binding upon the ward. *Morrison v. Morrison,* 25 Wash. 466, 65 Pac. 779. No contention is made that there was any defense to the foreclosure action, or that the ward's interests were not as fully

protected as though the answer had been filed by the guardian *ad litem*. The decree of foreclosure is therefore valid as to her.

Counsel for appellants further contends that, as to the appellant Joseph Gravelle, the court erred in allowing an attorney's fee in foreclosure, in calculating the amount due, and in limiting the time for redemption to ninety days. It is conceded that the minor Joseph Gravelle was not made a party to the original foreclosure proceeding. That proceeding was therefore not effective as to him. The respondent, in answer to the complaint, set up the mortgage and the proceedings had thereunder, and alleged that it was a mortgagee in possession, and prayed for a foreclosure against the said minor. This proceeding was proper under the rule announced in the cases of *Investment Securities Co. v. Adams,* 37 Wash. 211, 79 Pac. 625; *Sloane v. Lucas,* 37 Wash. 348, 79 Pac. 949; and *Sawyer v. Vermont Loan etc. Co.,* 41 Wash. 524, 84 Pac. 8.

The mortgage provided for a reasonable attorney's fee in case of foreclosure. The plaintiffs did not recognize the mortgage in their complaint, and seek to redeem their portion of the land covered by it; but brought the action for possession and for partition, alleging that they were the owners of two-thirds thereof, without reference to the mortgage. The respondents were required, therefore, to set up the mortgage, and asked for its foreclosure as a defense to this action. Under these circumstances, we think they were entitled to a reasonable allowance for attorney's fees as provided in the mortgage, which was made in this case. As we understand from the briefs, there is no claim that the court adopted an erroneous method of computing the amount due from appellant Joseph Gravelle's interest in the land, but it is insisted that an erroneous result was reached. We are satisfied that the result reached by the trial court is sufficiently accurate for all practical purposes, and that there are no ma-

terial inaccuracies sufficient to warrant the modification. Appellant concedes that in *Sloane v. Lucas, supra,* this court permitted a decree allowing ninety days within which to pay the mortgage debt in a case of this kind, but contends that a different rule should be applied in this case because the appellant is a minor. No other reason is offered. We think the mere fact that the appellant is a minor is not sufficient reason in itself for a different rule.

There appears to be no error in the record. The judgment is therefore affirmed, with leave to redeem the interest of the minor Joseph Gravelle within ninety days from the date of the filing of the remittitur.

DUNBAR, ROOT, CROW, and HADLEY, JJ., concur.

[No. 6039. Decided March 27, 1906.]

WILLIAM A. COLE, *Respondent,* v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant.*[1]

DAMAGES—PERSONAL INJURIES—INSTRUCTIONS—OBJECT OF RIDICULE—HARMLESS ERROR. In an action for personal injuries sustained by a passenger, where liability for serious injuries and impairment of hearing is admitted by the defendant, argumentative instructions to the effect that the defendant would be liable for damages if the plaintiff was rendered an object of ridicule or deprived of the companionship of his fellows, is not prejudicially erroneous, although there was no evidence warranting the same, where the jury saw and heard the plaintiff upon the witness stand, and could therefore judge whether any such conditions existed.

SAME—MEDICAL ATTENDANCE—LIMITING TO AMOUNT ALLEGED. In an action for personal injuries, an instruction limiting the recovery for medical services and loss of time to the amount alleged in the complaint is not erroneous as a suggestion that there was sufficient evidence to warrant findings for such sums.

SAME—PROBABLE LOSS OF TIME AND FUTURE EXPENDITURES. An instruction is proper allowing the jury, in assessing damages for personal injuries, to take into consideration the probable loss of time and expenditures that plaintiff will be put to in the future,

[1]Reported in 85 Pac. 3.

where the expert witnesses testify that further medical attendance would probably be necessary; and the same is not objectionable because not expressly limited to expenditures that are reasonably necessary.

SAME—PERMANENT IMPAIRMENT OF MENTAL FACULTIES. An instruction allowing damages for permanent impairment of mental faculties is warranted where the evidence tended to show permanent impairment of health, lack of mental vigor and control, and inability to give intelligent and consecutive attention to business, never experienced prior to the accident, and consequent decrease in earning power.

ROOT, J., dissents.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 19, 1905, upon the verdict of a jury rendered in favor of the plaintiff in an action for injuries sustained by a passenger in a street car collision. Affirmed.

Peters & Powell, for appellant.

Hastings & Stedman, for respondent.

CROW, J.—This is an action to recover damages for personal injuries. The appellant, Seattle, Renton & Southern Railway Company, a corporation, operates a line of electric railway between Seattle and Renton, in King county. On October 25, 1904, a collision occurred between two of its cars, on one of which the respondent, William A. Cole, was a passenger. After the collision respondent was picked up in an unconscious condition, and taken to a hospital, where he remained for two or three weeks before recovering sufficiently to return home. He alleges serious permanent injury to his general health, his mental and business capacity, and also his sense of hearing. The appellant has tendered no issue on its liability to answer in damages, the negligence of its employees not being denied. The only issues tried were the extent of respondent's injuries, and the amount of his damages.

The evidence tends to show that respondent received a violent blow upon the right side of his head, causing con-

cussion of the brain and nervous shock, from which he still claims to suffer; that his general health has been impaired; that he has sustained loss in business capacity, and also in mental energy and control. It appears beyond dispute that the sense of hearing in his right ear has been impaired. He also claims an injury to his eyesight, and contends that, although only thirty-five years old, he has aged rapidly since the accident. Although there is a sharp conflict in the evidence as to some of these claims, yet there is much testimony to sustain them. The jury returned a verdict in respondent's favor for $7,500, and from a judgment entered thereon, this appeal has been taken.

The only errors presented are based upon instructions to the jury, the first assignment being that the court erred in giving the following instruction:

"If a person or a corporation negligently causes an injury to another who is without fault, which makes the latter an object of pity to his fellow-men and an object of ridicule to the thoughtless and unfeeling and deprives him of the comfort and companionship of his fellows, should respond in damages for the injury sustained. Therefore if you find for the plaintiff and further find that among other injuries either or both of his ears were impaired at the time so that his hearing is impaired and a considerable degree of deafness has ensued which is more or less permanent, and as a consequence the plaintiff's ability to gain remunerative employment has been lessened or decreased, then you may not only allow him such sum as damages therefor as in your sound judgment will reasonably compensate him for the difference between his lessened earning capacity on account of such deafness, if any, and what it would be if his hearing was not impaired, but also compensation for any probable distress of mind or mental suffering, if any, that he may endure by reason of having such deafness."

The foregoing instruction seems to be the one most vigorously attacked, and upon the alleged error in giving it appellant seems to base its principal reliance for a reversal. It is contended by appellant that this instruction is argumenta-

tive, is not based on any evidence in the case, and is erroneous and prejudicial in the extreme. We think it subject to criticism in that it is perhaps argumentative, and includes expressions and statements not pertinent to the issues or evidence. It is true, as contended by appellant, that no direct evidence was offered sufficient to show the impairment of respondent's hearing to have been of such a character or degree as to make him an "object of pity to his fellow men," or "an object of ridicule to the thoughtless and unfeeling," or "deprive him of the comfort and companionship of his fellows," and these expressions should have been omitted by the court. There was ample and undisputed evidence showing that respondent's hearing, especially in the right ear, had been seriously and perhaps permanently impaired. The jury, however, saw respondent, heard him give his testimony in open court in response to interrogatories propounded to him by counsel, and must have observed how well he could hear. If there was anything in his condition or appearance sufficient to render him an object of pity or ridicule, or to deprive him of the comfort and companionship of his fellow men, the jury knew that fact. On the other hand, if no such conditions existed or were apparent, they likewise knew that fact. We would not be justified in assuming they were in any way misled by the wording of this instruction.

The principal difficulty with the instruction is that it is based upon and quotes certain language used *arguendo* in *Gray v. Washington Water Power Co.*, 30 Wash., at page 674, 71 Pac., at page 209, which was not a part of any instruction there approved by this court, but was employed with reference to the facts then before the court arising out of the condition of the plaintiff in that case, who was shown to have been so horribly mutilated and disfigured as to render her appearance repulsive. It is not invariably a safe or correct practice for attorneys and trial courts to formulate instructions by inserting therein exact quotations from argu-

mentative language which an appellate court may have employed as applicable to an entirely different state of facts. Although this instruction may be correct as an abstract principle of law, it is not applicable to the evidence in this case.

Yet, notwithstanding this criticism, we fail to see how it constituted prejudicial error. The jury could not have been misled, as they saw respondent and knew his exact condition. No question was raised as to the fact of his injuries, nor as to the appellant's liability for damages. He was injured to some extent and was entitled to some compensation in damages, and we are not justified in presuming that the jury, ignoring the evidence and disregarding the appearance and condition of respondent, found he was an object of pity or contempt, or that he was liable to be deprived of the comfort and companionship of his fellows, nor can we presume that they allowed him additional damages on account of any such conditions not shown to exist. This being true, the argumentative character of the instruction, as disclosed by the use of the word "therefore," while objectionable, does not seem to us to have been harmful or prejudicial to appellant.

The court, in effect, further instructed the jury that they might, if warranted by the evidence, allow damages to respondent for medical services for which he had become liable or had obligated himself, in an amount not exceeding $100; also, that they could, if warranted by the evidence, allow him damages for loss of time, not exceeding $450. Appellant complains of these instructions, contending there was no evidence of any expense incurred for medical services exceeding $60 or $70; also, that it was for the jury to say whether the evidence as to loss of earnings amounted to $450. As we understand the appellant's contention, it insists that these instructions were an intimation or suggestion to the jury that there was evidence sufficient to warrant a finding of $100 for medical services, and $450 for loss of earnings. We do not think the instructions were improper or susceptible of any such construction. In his complaint respondent alleged dam-

ages for medical services incurred in the sum of $100, and for loss of earnings in the sum of $450, and all the court did was to limit the recovery to the amounts alleged, without any suggestion as to any sum which the evidence authorized or that should be allowed. The court properly based these instructions upon the issues presented by the pleadings. *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1091.

The court also instructed the jury as follows:

"If you find for the plaintiff in this action, and if you find by a fair preponderance of the proofs that he will suffer pain in the future, and will be subject to loss of time and expenditures because of such injuries, then you are instructed that you can in estimating his damages take into consideration the probable amount of pain he will suffer, the probable loss of time and the probable amount of expenditure he will be put to in the future on account of such injuries, all of which may be in addition to the other items, if any, that may enter into your calculations, but in no event shall the amount of your verdict exceed the sum sued for by the plaintiff, to wit, $15,650."

Appellant complains that by this instruction the court erred in permitting the jury to assess damages for the probable amount of expenditure the respondent will incur in the future, and contends there was no evidence to afford a basis for awarding any such damages, and that the jury was left to assess damages by mere guess, without being told the expenditures must be reasonably necessary. A number, if not all, of the physicians called as witnesses testified that it might be, or probably would be, necessary for the respondent to have further medical treatment. While it was impossible to estimate, with mathematical certainty, what such treatment would cost, the jury, when awarding damages, were authorized to consider the probability of such treatment becoming necessary. This instruction, we think, is within the rule heretofore announced by this court. See, *Gallamore v. Olym-*

pia, 34 Wash. 379, 75 Pac. 978; *Webster v. Seattle etc. R. Co., ante* p. 364, 85 Pac. 2.

The last instruction complained of by the appellant reads as follows:

"If through any negligence of the carrier or its employees a passenger is injured without any fault or negligence on his part, then such carrier becomes liable for all damages that such passenger may suffer on account of any injuries so received or that are directly and proximately traceable to such injuries which would be reasonable compensation for the pain and suffering arising to him from such injuries as well as for all permanent injuries to him or to any portion of his body or the permanent impairment of any of his organs and for any injury to his mental faculties caused by such injuries, and in this connection if you find for the plaintiff in this action you may consider the evidence, if any relating to the plaintiff's mental faculties, and if you find that the plaintiff's mind or his mental faculties were injured or permanently impaired by reason of said injuries, then you may consider damages therefor, and in estimating such damages you should consider the degree of probable permanent injury to plaintiff's mind and to what extent such impairment of plaintiff's mental faculties, if any, lessens plaintiff's capacity for performing equally as remunerative employment as before such injuries; and if you find that his capacity for obtaining employment or earning a livelihood has been lessened by reason of such injuries to his mind or to his mental faculties, then you may estimate how much less the plaintiff will probably earn for the balance of his life by reason of such injuries and allow the plaintiff therefor."

The principal objection urged to this instruction is, that by it the court permitted the jury to award damages for any permanent impairment of plaintiff's mind; that it was not justified by the evidence and was extremely prejudicial. Appellant also contends that, if the only issue to be tried had been whether there was any permanent impairment of plaintiff's mental faculties, the court, for want of evidence, could not have allowed such issue to go to the jury. Appellant evidently regards the evidence on this issue too lightly. The

record discloses evidence tending to show not only a permanent impairment of plaintiff's health, but also that his mind was affected. By this we do not mean that he was mentally incompetent, or that his reasoning faculties were destroyed, but the evidence did tend to show a lack of mental vigor or control after the accident which did not exist before; also an inability to give intelligent, successful and consecutive attention to his business, which he had never experienced prior to the accident. While some question arose as to whether this condition would be permanent, there was evidence tending to show that the respondent might not fully recover. If any decrease in the respondent's mental vigor and ability, impairing his capacity to earn money, was caused by his injuries, it was certainly proper for the jury to consider such condition in estimating the damages to be awarded. There was evidence tending to show a decrease in his earning capacity by reason of the lack of his former mental vigor. Without entering into a detailed statement of such evidence, we think it sufficient to warrant the giving of this instruction, which, upon the facts shown, was not erroneous.

There being no prejudicial error in the record, the judgment is affirmed.

MOUNT, C. J., DUNBAR, and HADLEY, JJ., concur.

ROOT, J. (dissenting) — A careful consideration of the record convinces me that the verdict in this case was excessive. I do not think the evidence justifies any judgment greater than $4,500. I therefore dissent from the conclusion announced by the majority of the court.

[No. 5869. Decided March 29, 1906.]

LEWIS DUSENBERRY *et al., Appellants,* v. WILLIAM McDOLE *et al., Respondents.*[1]

PRINCIPAL AND AGENT—AGENCY—UNDISCLOSED PRINCIPAL—BILLS AND NOTES—AUTHORITY TO ACCEPT PAYMENT IN GRAIN. Where a note and mortgage is made to an agent of a nonresident loan company holding a general power of attorney, without disclosing his principal, and it is agreed that the payments may be made in grain, and payments were so made for ten years, it must be held that the agent represents and is acting for the mortgagee in receiving payments in grain, and had authority so to do.

Appeal from a judgment of the superior court for Columbia county, Miller, J., entered April 1, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

Miller & Fouts, for appellants.

M. M. Godman, Hardy E. Hamm, and *M. F. Gose,* for respondents.

MOUNT, C. J.—This action was brought to foreclose a mortgage upon certain real estate in Columbia county. The complaint is in the usual form in foreclosure. The answer of the mortgagor, after denying among other allegations the amount alleged to be due, affirmatively pleaded payment, and also that the action is barred by the statute of limitations. At the trial of the case the lower court sustained the plea of payment and dismissed the action. The facts are, in substance, as follows: In the year 1890, the respondent Jacob Stencel was the owner of the land in question. In March of that year he sold the same to respondent McDole, and gave him a bond for a deed. In December of the same year Mr. Stencel agreed to deed the land to Mr. McDole and take a purchase money mortgage for the amount due, and that

[1]Reported in 85 Pac. 40.

Mr. McDole might pay the notes by delivering grain each year.

At that time Mr. Stencel was agent for the appellants, who were then, and are now, residents of California, loaning money in Columbia county. Mr. Stencel held general powers of attorney for collecting money due the appellants, and satisfying mortgages in said county. The appellants furnished the money in this case, and Mr. Stencel executed a deed to Mr. McDole; whereupon the latter, on December 23, 1890, executed his three promissory notes, one for $1,000 due November 1, 1891, and one for $1,000 due November 1, 1893, and one for $1,350 due November 1, 1894, payable to the appellants, and on the same day executed and delivered to Mr. Stencel the mortgage sued upon, which was given to secure the payment of the notes above named. Thereafter, until the year 1900, respondent McDole delivered large quantities of grain to Mr. Stencel to be applied in payment of the notes, and it appears to be conceded that more than enough grain was delivered to pay the notes; but Mr. Stencel testified that Mr. McDole drew ahead for so many other purposes that the amount credited upon the notes was all that was left to apply thereon.

After the crop for the year 1899 had been delivered to Mr. Stencel, while he then had the notes in his possession at Dayton in Columbia county, a settlement was had between Mr. Stencel and Mr. McDole, and it was then agreed between them that the notes had been fully paid. Mr. Stencel agreed to deliver the notes to Mr. McDole on the next day. This, however, was never done. It appears to be a conceded fact, that all payments made by Mr. McDole upon the notes were made by the delivery of grain to Mr. Stencel; that Mr. Stencel received the grain and sold it and retained the proceeds to be credited upon the notes. Appellants claim that Mr. Stencel was the agent of Mr. McDole for the purpose of selling the grain, and that if he was agent for appellants, he was author-

ized to receive payment only in money. The trial court found against both these contentions.

We think the evidence is conclusive that Mr. Stencel was the agent of appellants for all purposes connected with the notes and mortgage. He made the loan for the appellants, and it appears that Mr. McDole had no knowledge of the fact that the notes and mortgage were made out to the appellants until about the time the action was brought to foreclose. Mr. Stencel was the only person that respondent knew in the transaction, and respondent dealt with him as the principal. It was agreed when the notes were given that payments should be made in grain, and payments were so made for nearly ten years. No money payments at all were made. All payments were made in grain. While it is true that an agent authorized to receive payment is ordinarily deemed intrusted with power to receive it in money only, yet when there has been a long course of dealing and payments are received by the agent according to such course, if the agent alone is known, and he is supposed to be the principal, and the debtor has no notice of any claim by the real principal, the latter will be bound. Story, Agency, (9th ed.), §§ 429, 430.

Furthermore, the appellants must be held to have ratified the payments in grain, or they must be held to have disaffirmed such payments. In the latter event the notes were long since barred by the statute of limitations. In the former event the notes have been paid. Under the facts in the case, we are convinced that Mr. Stencel had authority to receive the grain as payment of the notes, and that he was the agent of appellants for that purpose, and not the agent of Mr. McDole.

The questions of fact presented in the case are based upon conflicting evidence, which we have examined, and we conclude that the findings of the lower court are in accordance with the weight thereof.

The judgment is therefore affirmed.

ROOT, CROW, DUNBAR, FULLERTON, and HADLEY, JJ., concur.

[No. 5913. Decided March 29, 1906.]

GEORGE P. FISHBURNE, *substituted for Eric Edw. Rosling, Administrator etc., Appellant,* v. MERCHANTS BANK OF PORT TOWNSEND, *Respondent.*[1]

PLEADING—TRIAL—MOTION FOR JUDGMENT ON PLEADINGS—ADMISSIONS. Where defendant moves for judgment on the pleadings, and the plaintiff makes no application to amend, the motion has the effect of admitting all the allegations of the complaint and the reply considered together, notwithstanding the denials of the answer; and if no cause of action is stated, a trial of the issues raised by the denials of the answer is unnecessary.

EXECUTORS AND ADMINISTRATORS—ACTIONS—SET-OFF AND COUNTER-CLAIM—PRESENTATION OF CLAIM. Under Pierce's Code, § 1093, in an action by an executor or administrator, a demand against the deceased, belonging to the defendant at the time of the death of plaintiff's decedent, may be offset without the defendant's having presented any claim therefor against the estate; but he is limited to the extinguishment of the debt if no claim has been presented against the estate.

SAME—NOTE OF DECEASED NOT DUE AT DATE OF DEATH. In an action by an administrator to recover of a bank the amount of deposit belonging to the deceased, the bank may offset a note belonging to it at the time of the death of the deceased, which matured after such death, but before the commencement of the action, under Pierce's Code, §§ 380, 1091, and 1093.

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered July 8, 1905, upon the pleadings upon the motion of the defendant, in an action to recover a deposit in a bank. Affirmed.

Eric Edw. Rosling, for appellant.

A. W. Buddress, for respondent.

HADLEY, J.—The plaintiff and appellant, administrator in this cause, having died pending the appeal, and it having been made to appear to this court that George P. Fishburne has been appointed to succeed the deceased administrator,

[1]Reported in 85 Pac. 38.

it is now, on stipulation of the parties, ordered that said George P. Fishburne, as such administrator, shall be, and he is hereby, substituted as party plaintiff and appellant herein.

The action was brought to recover the balance of a deposit in the defendant bank, alleged to have been due and owing to William H. Fiske, now deceased, at the time of his death. The complaint alleges that said Fiske died September 26, 1901, and facts concerning the appointment and qualification of the original plaintiff as administrator are also alleged. It is also averred that, at the time of his death, the said Fiske had on deposit with the defendant, a banking corporation, the sum of $312.55, which amount was placed to his credit upon the defendant's books, and that the defendant refuses to pay said sum or any part thereof, although demand has been made therefor. Judgment is demanded for the full amount with interest.

The defendant answered the complaint, and interposed certain affirmative defenses, among which were averments charging the deceased with having fraudulently sold to the defendant fifty-three certain negotiable instruments for the payment of money; that the deceased was in possession of said instruments before their maturity, and that they were payable to the order of F. Chevalier & Company, whose indorsement was unlawfully forged upon the instruments by the deceased, for the purpose of deceiving and defrauding the defendant; that thereby the defendant was induced to purchase said negotiable instruments for the aggregate sum of $13,094.26, and gave the deceased credit upon its books for said sum; but that, by reason of the premises, the credit so given was false and untrue; and that there is not now, and never has been, any money due or owing to the deceased from the defendant; that before the deceased departed this life, he drew out of defendant's bank, by reason of said fraudulent acts and credit, the sum of $12,781.71, leaving a balance of $312.55 of said false and fraudulent credit; that

plaintiff's complaint is wholly founded upon, and is brought to recover upon, said false credit, and not otherwise; that immediately after the deceased departed this life, and not before that time, the defendant discovered said false and fraudulent acts and representations; that the true owner of said instruments reclaimed and recovered them from the defendant, the defendant being obliged to surrender them all, and that it thereby lost the use and value thereof.

The plaintiff replied with denials, and affirmatively alleged, among other things, that on or about September 18, 1901, the said deceased borrowed from the defendant, upon his personal note of that date, and maturing November 17, 1901, the sum of $333.31, which amount was by defendant placed to the credit of the deceased upon its books; that said note, at the time of the death of Fiske, had not matured, and that thereafter, about March 31, 1902, the defendant wrongfully and without the knowledge or authority of plaintiff, applied upon said note the balance due the deceased at the time of his death, to wit, $312.55.

With the pleadings standing thus, but containing also other averments which we have not thought it is material to mention, the defendant moved for judgment upon the pleadings in its favor. The motion was granted, and judgment was entered dismissing the action and awarding costs to the defendant. The plaintiff has appealed.

It is assigned that the court erred in entering judgment for respondent upon the pleadings. It is argued that the denials in the pleadings of the respective parties made issues which should have been tried. The motion of respondent, however, had the effect of admitting all the allegations of the complaint and of the affirmative averments of the reply, considered together. With such admission, there was no necessity for any proof upon the part of appellant, since if a challenge to the sufficiency of his allegations developed that he was not entitled to recover, a challenge to the evidence in support thereof would have led to the same result. The

record does not disclose any application on the part of appellant for leave to amend his pleadings. The supreme court of California, in *Kelley v. Kriess,* 68 Cal. 210, 9 Pac. 129, pertinently said:

"If plaintiff has a good cause of action, which by accident or mistake he has failed to set out in his complaint, the court, on motion for judgment on the pleadings, should, on his application so to do, permit him to amend; but failing to make such application, there can be no good reason for proceeding to trial, in a cause where, admitting all the facts charged as true, the plaintiff is still not entitled to a judgment."

No application to amend being disclosed, it must be presumed here that the appellant stood on his pleadings as they were originally filed. *Carstens v. Milo,* 40 Wash. 335, 82 Pac. 410; *Noerdlinger v. Huff,* 31 Wash. 360, 72 Pac. 73.

Since all the allegations of the complaint, and all those of the affirmative reply, are admitted to be true, the question is, does appellant show thereby that he is entitled to recover? He sues to recover an alleged balance of $312.55 deposit in respondent's bank, which he says was due the deceased. The respondent sets up a counterclaim by way of fifty drafts and three promissory notes, amounting to $13,094.26. Appellant then replies, in one breath denying everything, and in the next breath admitting that there is due and owing to the bank the sum of $333.31, which the deceased borrowed from the bank on his personal note, and which is described in respondent's answer. It being thus admitted by appellant that the deceased was indebted to the bank in a sum greater than the amount of the alleged credit sued upon, it remains to be determined if the debt can be offset to the extent of the credit. Under appellant's allegations, the money which he seeks to recover is the same which the deceased borrowed on his personal note, and which was, by reason of the note, placed to his credit in the bank. He first urges that respondent is not entitled to interpose the note to the extent of extinguishing the credit sued upon, for the reason that he did not present

to the administrator any claim founded upon the note within one year from the publication of notice to creditors. This is, however, an action brought by an administrator, asserting a demand in favor of an estate. In such case Pierce's Code, § 1093, provides as follows:

"In actions brought by executors and administrators, demands against their testators and intestates, and belonging to defendant at the time of their death, may be set off by the defendant in the same manner as if the action had been brought by and in the name of the deceased."

It will be seen that the above statute expressly authorizes a set-off to be interposed by the defendant in an action brought by an executor or administrator, and it does not require that such set-off claim shall be first presented to the executor or administrator. We do not think that other provisions of the code, when considered in connection with the above, can be said to contemplate such presentation when the set-off is merely pleaded to the extent of extinguishing the amount sought to be recovered by the executor or administrator. Speaking of the special statutes of limitation requiring the presentation of claims to executors or administrators, Wood, on Limitations (3d ed.), concludes § 188 as follows:

"These special statutes of limitation do not apply to an off-set set up by a person who is sued by an administrator to recover a debt due from him to the estate."

The only case cited under the above text is *Lay v. Mechanics Bank,* 61 Mo. 72. The case is directly in point. It has, however, been frequently so held, and to the general effect that, while under such special statutes one must present his claim within the prescribed time before he may assert his right to recover in an action brought by him against the estate, yet he is not required to so present it before interposing it as a set-off or counterclaim in an action brought against him by the administrator upon a money demand. He is, however, limited to the extinguishment of the demand made against him, and is not entitled to judgment over against

the estate for any excess. *Ware v. Howley,* 68 Iowa 633, 27 N. W. 789; *Mitchell v. Rucker,* 22 Texas 67; *Murphy v. Colton,* 4 Okl. 181, 44 Pac. 208; *Millet & Co. v. Watkins' Adm'r,* 67 Ky. 642; *Talty v. Torling,* 79 Minn. 386, 82 N. W. 632. Some decisions are to the contrary effect, but some of them are based upon statutes which expressly provide that claims may not be interposed by way of set-off or counterclaim, unless presented within the statutory limit. But whatever may be the reasoning of such decisions, we think, under our statute, that this court should follow the decisions above cited.

It is next contended by appellant that respondent is not entitled to interpose the note as a set-off or counterclaim, for the reason that it did not mature until after the death of Fiske, the maker. It had matured, however, before appellant brought his action. Under our statute a counterclaim may be interposed as follows: "In an action arising on contract, any other cause of action arising also on contract and existing at the commencement of the action." Pierce's Code, § 380, subd. 2. Again, Pierce's Code, § 1091, provides as follows:

"The defendant in a civil action upon a contract express or implied may set off any demand of a like nature against the plaintiff in interest, which existed and belonged to him at the time of the commencement of the suit."

Pierce's Code, § 1093, hereinbefore quoted in full, we have also seen provides that in actions brought by executors or administrators, a set-off may be interposed by the defendant "in the same manner as if the action had been brought by and in the name of the deceased," it being expressly stated that the set-off may be so interposed if the demand belonged to the defendant at the time of the death of the testator or intestate. Considering all these provisions together, we think the respondent had the right to interpose the note as a set-off, inasmuch as it had matured before the commencement of the action. It was so held under similar statutes in *Ainsworth*

v. Bank of Califronia, 119 Cal. 470, 51 Pac. 952. That case is directly in point, and the facts involved were almost identical with those at bar. The defendant bank held the note of the deceased for a sum greater than the amount to his credit on deposit at the time of his death. The note matured after the death and after its maturity the executrix brought suit against the bank to recover the amount of the balance of the deposit. In a well-considered opinion, it was held that the bank could interpose the note by way of counterclaim inasmuch as it was due before the commencement of the action. The California statute quoted in the opinion is exactly the same as our own. Section 380, subd. 2, *supra.* We think the decision was manifestly correct, and our statute being the same, it should be so held here. We therefore find it unnecessary to discuss the decisions cited by appellant, some of which at least are based upon somewhat different statutes.

For the foregoing reasons, we think appellant's pleadings, the complaint and reply, taken together, do not state a ground for recovery, and that the judgment for respondent upon the pleadings was proper.

It is therefore affirmed.

MOUNT, C. J., FULLERTON, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 6016. Decided March 29, 1906.]

JOSEPH N. MORRIS, *Appellant*, v. MAYNARD WARWICK, *Respondent*.[1]

TRIAL—VERDICT—TAKING CASE FROM JURY. The trial judge has no power to discharge the jury and render judgment for the defendant because he thought a new trial would be necessary if any other verdict was rendered, unless there is no sufficient legal testimony to sustain a verdict for the plaintiff.

HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—DEFENSES—PRIOR SEPARATION. A separation of a husband and wife, prior to any acts by the defendant cannot be set up as a bar to an action for alienation of the affections of the wife, on the theory that no affection existed; the right to a reconciliation being one that a stranger cannot interfere with.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered November 17, 1905, in favor of the defendant, upon withdrawing the cause from the consideration of the jury, after a trial on the merits, in an action for alienating the affections of a wife. Reversed.

H. N. Martin, J. T. Mulligan, and *N. T. Caton,* for appellant.

Merritt & Merritt, for respondent.

DUNBAR, J.—This is an action brought by the appellant against the respondent, for damages for alienating the affections of his wife. At the close of plaintiff's testimony, defendant's motion for a nonsuit was denied, and at the close of the case the defendant challenged the legal sufficiency of the testimony, and also moved the court for an instructed verdict. The court was of the opinion that the proper procedure would be to discharge the jury and enter judgment, which it proceeded to do, entering judgment in favor of the defendant.

In speaking of the case of *Clark v. Great Northern R. Co.,*

[1]Reported in 85 Pac. 42.

37 Wash. 537, 79 Pac. 1108, the court intimated that it was its duty to discharge the jury in this case, and decide the case on the weight of the testimony, making the following statement: "I wish you would read that *Clark* case all through. I do not know as I exactly understand it yet myself. If it means what it says, as I understand it, the jury would be simply an ornament." The court then proceeding, said:

"In this case the duty devolves upon the court under the law laid down, to take the case from the jury and render a verdict in accordance with the court's opinion, and in view of the fact that the court in this case has listened to the testimony, and is satisfied that a verdict in this case must be in favor of defendant, that the plaintiff has failed entirely to make out a case, and that the facts in this case, as applied to the law, would compel a verdict of that kind, and in view of the fact that you, gentlemen, not understanding the law, probably might bring in a verdict some other way, which I would be compelled to set aside, I think the proper thing to do would be to discharge the jury and render a verdict myself. So you are excused from any further duty in this case, and judgment will go for the defendant in this case."

The court evidently misinterpreted the *Clark* case, for it was not the intention of this court in that case to subjugate the discretion of the jury in passing upon questions of fact to the will of the court, or to go beyond the provisions of the statute. In that case it appeared from statements made by the court that he thought a new trial ought to be granted for insufficiency of the evidence, but that the court did not have the legal authority to grant such new trial; and it was held by this court that the court erred in its construction of the law, for the statute, Bal. Code, § 5071, subd. 7, especially makes insufficiency of the evidence to justify the verdict a ground for granting a new trial. But it will be observed that it does not authorize the court to take the case from the jury and make a final determination of the issues itself; but

that, acting on the supposition that substantial justice has not been done by reason of some mistake or inadvertence of the jury, simply gives the parties another trial. As to how often the court would be justified in granting a new trial on the same testimony in the same case, is a question to be determined by the appellate court in passing upon the proper exercise of such discretion on the part of the trial court. Under the theory of the law, however, the ultimate decision upon the question of fact involved is the province of the jury. Bal. Code, § 4994, provides that,

"In all cases tried in the superior court with a jury in which the legal sufficiency of the evidence shall be challenged, and the court shall decide as a matter of law what verdict should be found, the court shall thereupon discharge the jury from further consideration of the case, and direct judgment to be entered in accordance with its decision."

This section, it will be observed, deals alone with the legal sufficiency of the evidence, not taking into account at all its probative sufficiency. That is to say, if the evidence offered, if admitted to be true, is not legally sufficient to sustain a verdict, there is nothing for the jury to pass upon, and it becomes the duty of the court to discharge the jury and render the judgment which the law prescribes. So that it will be seen that there was no justification, under the law, for the action of the court in discharging the jury and rendering judgment for the defendant in this case, unless it appears that there was not sufficient legal testimony offered by the plaintiff to sustain a judgment. In fact, it is candidly stated by the attorney for respondent in his brief that, if it could be maintained that there was evidence legally sufficient to support a verdict, then it cannot be doubted that the jury should have passed upon the facts.

But it is contended that there was not sufficient evidence in the case. With this conclusion of learned counsel we cannot agree. It seemed to be the view of the trial court that the conduct of the defendant and the plaintiff's wife, at any

time after the separation of plaintiff and his wife, was not pertinent nor material, on the theory, as indicated by the court, that there could be no alienation of affection where none existed. But it does not necessarily follow that affection does not survive a separation. No arbitrary standard of action can be erected by which conjugal affection can be tested or measured. It differs in intensity and constancy with the different temperaments and characters of the individuals. It may be so superficial that slight provocation would be sufficient to destroy it, or it may be so deeply rooted that it will survive neglect, disgrace, brutal treatment, and desertion. It sometimes even outlives legal separation, as is proven by many authenticated instances of men and women remarrying after divorce has been obtained. Husbands and wives, in the heat of passion engendered by wrongs, real or imaginary, may, and frequently do, separate from each other, and yet when time gives opportunity for reflection and self-examination, it is frequently discovered by both parties that the actual cause of dissension was really trifling, that affection was not annihilated, but simply for the time being forced into the background, and reconciliation is devoutly desired by both. And it is this right to a reconciliation that a stranger has no right to interfere with, or deprive a husband or wife of. They are legally husband and wife until they are divorced, and legal responsibility still attaches to the husband to support the wife. It is well-established law in this country that evidence offered by the defendant to show a state of facts indicating that no affection existed between the plaintiff and his wife will not be heard as a bar to action for alienation of affection, but will simply be heard in mitigation of damages. Some of the authorities go so far as to hold that, where it was admitted that the wife had no affection for the plaintiff, a third party had no right to interfere or cut off any chance of an affection springing up in the future; and that it is not in the interest of good order and public morals to permit one who has no right to interfere to set up a disagreement, or

even separation, as a complete defense to an action by the latter for the wrong. Elliott, Evidence, § 1650; 15 Am. & Eng. Ency. Law (2d ed.), p. 862; Sutherland, Damages (3d ed.), p. 3771; Cooley, Torts (2d ed.), p. 263; and cases cited by the above authorities, which fully sustain the text. Without specifically analyzing the testimony, it is sufficient to say that there is ample evidence, if the jury believed it, to sustain a judgment against the defendant.

The judgment of the court will therefore be reversed, and a new trial had.

MOUNT, C. J., ROOT, CROW, FULLERTON, and HADLEY, JJ., concur.

[No. 6018. Decided March 31, 1906.]

P. C. SHINE *et al., Appellants,* v. GEORGE E. CULVER *et al., Respondents.*[1]

PLEADINGS—AMENDMENTS—DISCRETION. It is discretionary to permit a trial amendment of the answer, and no abuse of discretion appears where application was made several days before the trial, and no request for a continuance was made.

REPLEVIN—TITLE—EVIDENCE—ADMISSIBILITY. In an action of replevin in which the plaintiffs claim title through one R., evidence that the title of R. was fraudulent is competent under a denial that R. was the owner.

SAME—ORAL EVIDENCE OF CONTENTS OF DEED—REFUSAL TO PRODUCE INSTRUMENT. In replevin for certain tools, claimed by the defendants to have been sold to them by the plaintiffs and to have been mentioned in a quitclaim deed of the quarry, oral evidence on the part of the defendants as to the contents of such deed is admissible where the plaintiffs had obtained possession of the deed, which was not recorded, and plaintiffs failed to produce it at the trial after being requested to do so.

ATTORNEY AND CLIENT—REPRESENTING ADVERSE INTERESTS. The fact that an attorney had represented the plaintiff, by courtesy, in another action between other parties respecting certain personal property, would not preclude his appearance for the defendants in

[1]Reported in 85 Pac. 271.

an action of replevin for the same property, where he had in the former action particularly represented the defendants, and no inconsistency appears in such representation.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered April 24, 1905, upon the verdict of a jury rendered in favor of the defendants, in an action of replevin. Affirmed.

Charles V. Roberts and *P. C. Shine,* for appellants.

Jas. A. Williams and *Denton M. Crow,* for respondents.

MOUNT, C. J.—Appellants brought this action in the court below, to recover possession of a certain lot of stone cutter's tools, and for rent for the use of the tools. The complaint alleged ownership and right of possession in the plaintiffs. The defendants answered, denying the allegations of the complaint, and alleged ownership and possession in themselves. Upon these issues the case was tried to the court and a jury. A verdict was rendered in favor of the defendants, and a judgment entered thereon. Plaintiffs appeal, and allege that the court erred in permitting respondents to amend their answer at the time of the trial.

The application to amend appears to have been made and served several days before the trial. The appellants were, therefore, not taken by surprise, and no request for a continuance was made on account of the amendment. Amendments of the kind here allowed are largely discretionary with the trial court, and its action in that respect will not be disturbed in the absence of an abuse of such discretion. *Bishop v. Averill,* 19 Wash. 490, 53 Pac. 726; *Jones v. Western Manufacturing Co.,* 32 Wash. 375, 73 Pac. 359. No abuse of discretion appears in this case.

Appellants next allege that the court erred in admitting certain evidence tending to show that the title of the property in Robert Russell was fraudulent. Appellants claim title through Russell. In order to maintain their title, it was necessary to show that Russell was the owner. Respondents

denied that Russell was the owner, and alleged that his claim of ownership was fraudulent. Any evidence which tended to show that such claim was fraudulent was competent to defeat appellants' claim of ownership. It was therefore not error to receive the evidence.

Appellants allege that the court erred in refusing to strike certain evidence as to the contents of a quitclaim deed. Respondents claim title to the tools through appellant Shine. It appears that Mr. Shine sold a certain interest in a stone quarry to respondents by a quitclaim deed, and respondents testified that a part of the tools in question were sold along with the quarry, and that the quitclaim deed recited the fact that the tools were conveyed with the land. This, however, was denied by Mr. Shine. It also appears that Mr. Shine had obtained possession of the deed, which had not been recorded, and had retained the same prior to the trial. He was required to produce the deed at the trial, and failed to do so. The trial court thereupon permitted oral evidence of its contents. The evidence was clearly competent under the circumstances, and the court did not err in refusing the motion.

Appellants next complain that the court erred in refusing to exclude Mr. Williams, respondents' attorney, from the trial of the case, upon the alleged ground that Mr. Williams had previously been attorney for Mr. Shine in litigation between the same parties concerning these same tools. We find nothing in the record to justify this contention. It is true that Mr. Williams had previously represented Mr. Shine in another action between other parties in which a part of these tools were in question. But at that time Mr. Williams was representing these respondents particularly, and Mr. Shine by courtesy. There is no showing of any inconsistency in Mr. Williams now representing these respondents in this action as against Mr. Shine and his co-appellants.

No exceptions were taken to any of the instructions given to the jury, and the case seems to have been fairly tried, and there is ample evidence to support the verdict of the jury.

This is a second trial upon substantially the same issues, and a second verdict in favor of respondents. There appears to be no error in the record, and the judgment is therefore affirmed.

DUNBAR, ROOT, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

CROW, J., having been of counsel, took no part.

[No. 5926. Decided April 3, 1906.]

CORA ATTEBERY *et al., Plaintiffs and Appellants,* v. B. F. O'NEIL *et al., Defendants and Appellants.*[1]

MORTGAGES—BONA FIDE PURCHASER—RECORD—NOTICE—EQUITABLE CLAIM—NOT APPEARING OF RECORD. A mortgagee is a *bona fide* purchaser for value without notice where, at the time the mortgagor acquired title to the mortgaged premises, he was a widower living on the land with minor children, the mortgage was joined in by the mortgagor's second wife, and there was nothing of record and no actual notice to show that the first wife had an equity in the land by reason of an equitable interest or title in the mortgagor prior to her death.

SAME—STRANGER TO CHAIN OF TITLE. The record of a mortgage executed by one outside the chain of title is not constructive notice of any equity or claim.

SAME—ACTUAL NOTICE—MINORS LIVING WITH PARENT. The fact that minor children were living on the land with their father at the time a mortgage was executed by the father would not import notice of any claim on their part.

Cross-appeals from a judgment of the superior court for Spokane county, Neal, J., entered January 2, 1905, upon findings by the court after a trial on the merits without a jury, in an action of ejectment. Reversed and action dismissed.

Mark F. Mendenhall, Wm. E. Richardson, and *Harry A. Rhodes,* for plaintiffs.

A. E. Gallagher and *W. J. Thayer,* for defendants.

[1]Reported in 85 Pac. 270.

PER CURIAM.—On the 13th day of September, 1884, the Northern Pacific Railroad Company agreed to convey the south half of section 31, township 21, North, Range 45, East, W. M., in Spokane county, to Adelbert H. Wheeler, by written contract of that date. On the 9th day of October, 1884, said railroad company agreed to convey lots 3 and 4, of section 5, township 20, North, Range 45, East, W. M., in Whitman county, to Thomas Coakley, by a like written contract. Coakley thereafter assigned his contract to Wheeler, and Wheeler assigned both contracts to M. M. Cowley as security. On the 26th day of June, 1887, Wheeler agreed to convey the lands embraced in both contracts to Hardin T. Attebery, in consideration of sixty bushels of wheat per acre, to be delivered in six annual installments of ten bushels to the acre each. At the instance of Wheeler, this contract was entered into between Attebery and Cowley, to whom the railroad contracts had been assigned. Some time thereafter the indebtedness due from Wheeler to Cowley was paid or taken up, and at the request of the former the railroad contracts and the wheat contract were assigned by Cowley to Ham & Son.

During the years 1888, 1889 and 1890, something over thirteen thousand bushels of wheat were delivered by Attebery to Ham & Son, under the above contract. In the latter part of the year 1890, D. T. Ham, the surviving partner of the firm of Ham & Son, agreed to accept $4,500 in cash in lieu of the balance of the wheat to be delivered under the wheat contract, and Attebery, the other party to the contract, agreed to pay that amount. The necessary assignments were thereupon executed to enable Attebery to obtain title from the railroad company, and on the 26th day of February, 1901, the lands embraced in both contracts were conveyed to Attebery by the railroad company. At or about the same time, Attebery and Samantha Attebery, his daughter, mortgaged the premises to the Deming Investment Com-

pany, for about $5,000, to enable them to make payment to D. T. Ham in satisfaction of the wheat contract.

Upon the execution of the wheat contract in 1887, Attebery, his wife and three daughters entered into possession of the lands described therein. In December, 1888, after the delivery of the first installment of wheat under the wheat contract, amounting to forty-two hundred bushels, the wife of Attebery, and the mother of the present plaintiffs, died intestate. It does not appear that any administration was ever had upon her estate. Some time prior to March 20, 1893, Attebery remarried, and on that day he and his second wife mortgaged the above described lands to the defendant O'Neil, to secure the payment of the sum of $1,891.50. This mortgage was regularly foreclosed, and the defendant O'Neil now holds and claims the land under and by virtue of a sheriff's deed. The plaintiffs brought this action as heirs at law of their deceased mother, to recover an undivided one-half interest in the property, and for an accounting of the rents and profits. The court below awarded them an undivided seven eighty-thirds of the property, and a like proportion of the net rents and profits. From this judgment both parties have appealed.

The two principal questions presented on the appeal are, (1) Did the mother of the plaintiffs have an interest in the property in controversy which passed to her children by operation of law upon her death? and (2) is the defendant O'Neil a *bona fide* purchaser for value without notice? The conclusion we have reached on the last question is decisive of the case. The court below found that the defendant O'Neil had full notice and knowledge of the right, title and interest of the plaintiffs as heirs of their deceased mother, at the time of the execution of the mortgage under which he claims title, but with this finding, we cannot agree. It is not claimed that O'Neil knew the former Mrs. Attebery, or knew that she or her children had or claimed any interest in the property, until long after the execution of the mortgage under which

he now holds. Nor did he have record notice. The only instrument of record affecting the title, aside from the deeds to Attebery, was the mortgage executed by Attebery and his daughter to the Deming Investment Company. The record of this mortgage was no notice of any claim on the part of the children, for as to them it was without the chain of title. The utmost notice it imported was that Attebery was unmarried at the time of its execution. Nor is there any merit in the contention that the residence of the plaintiffs upon the land with their father gave notice to third parties of any claim they might have to the premises. The occupation of land by minor children with their parents is entirely consistent with the full legal and equitable title in the parents, and is not of itself any notice of a claim on the part of the children. The court would perhaps have been justified in finding that the defendant O'Neil knew that the plaintiffs were the children of Hardin T. Attebery, by a former wife, but this would not be sufficient to charge him with notice of their claim to the property.

A purchaser must, no doubt, exercise due diligence to ascertain the status of his several grantors at the time they acquired and conveyed the property, but he is not bound to go outside of and beyond the record to ascertain whether any such grantor had an equity in the premises before he acquired his title, and whether he was married or single when such equity was acquired. If such were the case, records and deeds would be of little avail, and the evils resulting from the adoption of such a rule would far outweigh any benefits to be derived from it. If a grantee is unmarried at the time he acquires title to the property, and the record discloses no equity in him prior to the conveyance, a purchaser is under no obligation to look beyond this, and if he parts with his money in good faith, and without notice of any latent equity, the law will protect him.

We are therefore of the opinion that the defendant O'Neil

is a *bona fide* purchaser for value, without notice, and that he took the title free from any claim or equity that the plaintiffs or their deceased mother may have had in the premises. The judgment is therefore reversed, with directions to dismiss the action.

[No. 6026. Decided April 4, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Charles Matson et al., Plaintiff,* v. THE SUPERIOR COURT FOR SKAGIT COUNTY *et al., Respondents.*[1]

DRAINS—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE AUTHORITY. The drainage act, Bal. Code, § 3726, Laws 1895, p. 281, § 12, requiring the superior court to find that a proposed ditch is practicable and conducive to the public health and will increase the value of the lands, is not unconstitutional as a delegation of legislative authority; since the court does not originate or devise the system or plan but simply approves those proposed by the county commissioners.

DRAINS—PROCEEDINGS FOR ASSESSMENT. The drainage act of 1895 does not violate Const., art. 7, § 9, in that it imposes upon the court and jury the duty of making an assessment; since the assessment is made by the ditch commissioners after the jury determined the damages and the value of the land.

STATUTES—TITLE—AMENDMENT. Laws 1905, p. 360, entitled an act amending §§ 3, 9 and 24, of the drainage act entitled, etc., is unconstitutional as to the clause amending § 5 of the drainage act not mentioned in the title; but the same does not affect the amendments of §§ 3, 9 and 24, as they are independent of § 5, which relates only to the bond of the ditch commissioners.

DRAINS—DITCH COMMISSIONERS—BOND. The failure of ditch commissioners to qualify by filing a bond in the required amount, does not invalidate an assessment made by them as *de facto* officers.

DRAINS—PETITION—AMENDMENT. In proceedings for the establishment of a drainage district and ditches, it is proper to allow, upon notice, an amendment of the petition for the purpose of proposing a change in the system.

DRAINS—FEASIBILITY OF PLAN. The fact that some other plan would be more feasible does not deprive the court of jurisdiction to establish the system proposed.

[1]Reported in 85 Pac. 264.

NAVIGABLE WATERS—OBSTRUCTIONS—DAMS—CONSENT OF GENERAL GOVERNMENT. A meandered slough, which is dry except during high tide, when it is navigable for a short distance for small craft and floating logs, is not navigable to the extent of requiring the consent of the United States government to its obstruction by a dam across its mouth to keep tide water from a drainage district.

DRAINS — PETITION — SUFFICIENCY — DETAILED PLANS, SPECIFICATIONS AND ESTIMATES. A petition for the establishment of a drainage district and system of ditches, under the law of 1895, is insufficient where it contains no complete description of the proposed improvement, with detailed plans and specifications and draughts of necessary artificial appliances or equipment, or any estimate of the cost, all of which must appear with sufficient particularity to enable them to proceed by contracting for its construction without change or further plans and specifications.

DRAINS—COMPLETION OF SYSTEM. The drainage act of 1895 requires the completion of any proposed system of drains with all expedition possible, and it is not competent to propose a complete system, only a portion of which is intended to be constructed at the present time.

Certiorari to review a judgment of the superior court for Skagit county, Joiner, J., entered December 29, 1905, ordering the establishment of a drainage district and the assessment of damages by a jury, after a hearing on the merits. Reversed.

Benton Embree, for relators.

Million & Houser and *Dave Hammack,* for respondents.

CROW, J.—This is a certiorari proceeding, instituted for the purpose of having the court review the orders and proceedings of the superior court of Skagit county, in approving and establishing a drainage system, and calling a jury to assess damages to the lands of the relators and other property owners, for rights of way for the ditches necessary for said system, and to assess against lands to be benefited within said district the costs and expenses of establishment and construction.

On October 4, 1905, a petition was filed in the superior court of Skagit county, by Daniel Sullivan, Erasmus S.

Johnson and William A. Walters, commissioners of drainage district No. 16, as plaintiffs, against Charles Matson and Bertha Matson, his wife, the relators herein, and also against all other property owners and persons interested, as defendants. Said petition contained a full description of all lands within said district, and alleged, that the commissioners proposed to construct, for the benefit of all such lands, a system of drainage, consisting of eight ditches; that a survey and plat of said district had been made, showing the owners of property, the drainage system proposed, and lands necessary to be condemned for rights of way, which plat was attached to said petition and made a part thereof; that the lands within said district were marshy and covered with water; that the proposed improvement would be conducive to the public health, convenience and welfare, and would increase the value of all lands within said district, as estimated, for the purpose of public revenue; that said lands were valuable for agriculture; that said system of drainage was necessary so that said lands could be cultivated at a profit; that the names of owners whose lands were to be benefited, the number of acres owned by each, the maximum amount of benefits per acre, were as set forth in said petition in detail; that, for the purpose of carrying on said proposed improvements, it would become necessary to appropriate certain strips of land belonging to the various owners therein named, and that the estimated values of said lands, and the estimated damages irrespective of benefits to be derived by each tract were as set forth in said petition. Said commissioners prayed an adjudication that said proposed system would constitute a public improvement, that the lands sought to be appropriated were necessary therefor, and asked that a jury be called to assess all benefits and damages to lands not taken, and also the compensation to be paid for lands taken for right of way.

The original petition alleged no plans, details, or specifications for the construction of said improvement, disclosing

the exact character of the work, further than the same might be shown on the plat attached as an exhibit. No draughts of any artificial appliances or equipment necessary in aid of said improvement, together with its estimated cost, were filed with said original petition. The attached exhibit was a large plat of the entire district, showing the Samish river as the western boundary, the North Samish river, also called the Edison slough, as a portion of the northern boundary; also, showing on the western margin of the district a large slough known as McTaggart slough, tributary to the Samish river, and further within the district a second slough, known as the Sullivan slough, tributary to the McTaggart slough; and also showing, near the central portion of the western boundary of the district, another slough, known as the Johnson slough. All of these sloughs were available for use as reservoirs in said system, but the exact method of their proposed use was not stated, defined or detailed.

The plat further shows two main ditches; one, known as the Johnson slough ditch, beginning on the eastern boundary of the district, and running directly west into the Johnson slough, connecting with the Samish river; the other, known as the North Samish river ditch, commencing near the lower line of the district, running in a northerly course through its central portion for a distance of a mile, and thence in a northerly and northwesterly direction into the Edison slough. Another ditch, known as the Sullivan slough ditch, was to commence about one-half mile south of the Johnson slough ditch, which it crossed, and run in a northerly direction into the Sullivan slough, McTaggart slough, and Samish river. All other proposed ditches, five in number, were spurs or tributary to these main ditches. The two main ditches, the Johnson and the North Samish river, as originally proposed, were to cross each other at the southeast corner of section 4, on the south line of the land of the relators. The plat does not show the width or depth of the proposed ditches, or the

character of the work, nor does it provide for any boxes or flumes with flood tide gates where the ditches connect with said sloughs. The district is composed of lands below the level of high tide, protected by dikes. These dikes would obstruct the flow of drainage water from ditches and sloughs into the Samish river at low tide, were it not that boxes or flumes may be placed in the ditches and sloughs where they cross the dikes, the gates of said boxes and flumes closing during high tide and opening during low tide, so that the drainage from the district may be carried away.

The relators, Matson and wife, moved the court to require the commissioners to make their petition more definite and certain by setting forth or annexing thereto draughts, specifications and plans of the boxes or flood tide gates to be maintained in the North Samish river and various sloughs. This motion being sustained, the commissioners filed as an exhibit a single draught or general plan for a box or flume. No specifications were attached thereto, but the draught was drawn upon a scale disclosed thereon. By stipulation this draught was accepted as an amendment to the petition. The commissioners further amended their petition by inserting an additional paragraph, stating the sizes of the proposed ditches, by giving their respective proposed widths and depths. By said amendment they further alleged that a box with a flood tide gate would be maintained in the North Samish river where a dam is now constructed; that if necessary a box with a flood tide gate would be placed at the mouth of the North Samish river ditch; that a box with a flood tide gate would be maintained at the mouth of the Johnson slough; that one or more boxes, as may be necessary, would be maintained in a dam across the mouth of McTaggart slough; that the estimated amount of earth to be removed in constructing the North Samish river ditch, from the point where it crosses the Johnson ditch to its mouth, will be twenty-five thousand yards, at an approximate cost of $3,500; that the approxi-

mate cost and estimate for the construction of all the other ditches, and the remaining portion of the North Samish river ditch will be $1,500; that the costs of the proceedings were estimated at $500; that the costs of procuring right-of-way were estimated at $500; and that that part of the proposed Sullivan slough ditch from the Sullivan slough to the Johnson ditch was to be abandoned and not constructed.

The relators thereupon demurred to this amended petition, which demurrer being overruled, the issues were completed by answer and reply, and a hearing was had on December 4, 1905. The court, on December 11, 1905, made findings of fact in favor of the commissioners, and ordered a jury to be impaneled to estimate the values of the lands to be taken, and separately determine the damages and benefits to lands not taken. Prior to the entry of this order, the commissioners asked leave to further amend their petition by alleging their intention of constructing a dam across the Johnson slough ditch, immediately west of its junction with the North Samish river ditch. The trial court did not immediately grant this request, but directed the commissioners to notify all defendants of their proposed amendment. Afterwards, on December 20, 1905, the matter came on further for hearing upon the question of the allowance of the amendment, and all parties having been notified and the relators appearing by their attorneys, the amendment was allowed. Thereupon a new hearing was had, at which it was stipulated that the evidence theretofore introduced should be considered by the court, and that additional evidence might be offered.

On both hearings the main contest was over that portion of the proposed North Samish river ditch lying north of its junction with the Johnson slough ditch. No estimate of the cost of this ditch, or in fact any of the ditches, was made by the engineer who had prepared the plat. At the hearing, the attorneys for the commissioners, without further amending their petition, stated that it was not their present inten-

tion to construct or complete any of the proposed system except that portion of the North Samish river ditch north of its junction with the Johnson ditch. Nevertheless, an order was made for the condemnation of the right of way for all the proposed ditches and spurs, except that portion of the Sullivan slough ditch which had been taken out by the first amendment of the petition. No showing was made as to the cost or size of the boxes or flumes at the various sloughs. At the close of all the evidence, the relators moved for a dismissal of the proceeding, which motion being denied, an order calling for a jury was again made, except that a modification was entered by authorizing the amendment of said proposed system by the construction of said dam across the Johnson slough ditch. Thereupon the relators applied to this court for a writ of certiorari to review the proceedings of the superior court.

Drainage district No. 16 was organized and all these proceedings have been had under the provisions of the act of 1895, Laws 1895, pp. 271-296; Bal. Code, §§ 3715-3754. The relators contend this act is unconstitutionl because, (1) it attempts to confer upon the court powers, and to impose upon it duties, which are in no sense judicial, but legislative; (2) that it imposes upon the jury and the court the duty of making assessments upon lands benefited by reason of the improvement, and that this also calls for the exercise of legislative and not judicial functions.

In support of the first contention, the relators insist that the provision in § 12 of the drainage law, for a finding by the superior court "that said improvement is practicable and conducive to the public health, welfare and convenience, and will increase the value of said lands for the purpose of public revenue," is a delegation of legislative authority. We do not think this contention can be sustained. The statute nowhere provides, nor does it contemplate, that the court shall initiate, devise or propose the system of drainage. Such system or proposed improvement is first adopted by the commissioners

and set forth in their petition. The constitution of this state, art. 1, § 16, makes it a judicial question to be determined by the court whether any purpose for which private property is sought to be taken is a public use. In arriving at this determination, the court is required by the statute to first judicially ascertain whether the proposed improvement is practicable, conducive to the public health, welfare and convenience, and will increase the value of the lands for the purpose of public revenue. This being done, the court then further finds whether the proposed use of the lands sought to be taken is public. The court does not originate, devise or adopt any system or plans, although it may incidentally approve those proposed by the commissioners. The relators have cited the case of *Territory ex rel. Kelly v. Stewart,* 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106, which we do not think applicable as the authority there conferred upon the court by statute was to create a municipal corporation, and was held to be a delegation of legislative powers. In further support of their contention, they cite a large number of decisions from various courts which, upon examination, show that the various statutes declared to be unconstitutional attempted to confer upon the courts power to incorporate villages or other municipalities, or to determine what lands should be added to or withdrawn from municipal corporations already organized. The supreme court of Ohio, in the well-considered case of *Zanesville v. Zanesville Telegraph etc. Co.,* 64 Ohio St. 67, 59 N. E. 781, 83 Am. St. 725, 52 L. R. A. 150, sustained as constitutional a statute which is subject to more severe criticism in this regard than the one now before us.

The relators further contend that the law of 1895 is unconstitutional for the reason that it imposes upon the court and jury the duty of making an assessment, in violation of art. 7, § 9 of the constitution. We do not think the relators' construction of the statute is warranted by its language or provisions. All the jury is required to do is to ascertain

separately the damages and benefits to each tract of land not taken, and also the value of the land to be taken. The court does not impose any assessment, but a transcript of the proceedings is certified to the county auditor, who proceeds as directed by § 16, and the ditch commissioners afterwards, by the provisions of the same section, designate when assessments shall become due and payable; they take the steps necessary to make the assessment, and collect the tax. We see no merit in the contention of the relators that the statute is unconstitutional in any respect.

It appears that, when the district was organized, the ditch commissioners gave bonds in the sum of $2,100 each; whereas § 5 of the original act of 1895 provides for bonds in the sum of $5,000 each. On the morning of the first trial, the commissioners filed new bonds in the sum of $5,000 each, which were approved. The relators contend that the district organization, and all prior proceedings of the commissioners were void by reason of their failure to qualify as required by law. The legislature of 1905 (Laws 1905, pp. 360-365), attempted to amend § 5 of the act of 1895, so as to require a bond of $500 instead of $5,000, and the respondents now rely upon such amendment. The relators, however, contend that said amended § 5 in the act of 1905 is unconstitutional, for the reason that it is not included in the title as contemplated in article 2, § 19, of the constitution. The title of the act of 1905 reads as follows:

"An act to amend sections 3, 9 and 24 of an act entitled, 'An act to provide for the establishment and creation of drainage districts and the construction and maintenance of a system of drainage, and to provide for the means of payment thereof, and declaring an emergency,' approved March 20, 1895, the same being sections 3717, 3723 and 3738 of volume 1 of Ballinger's Annotated Codes and Statutes of Washington, and declaring an emergency."

It will be seen that by this title the legislature only contemplated an amendment of §§ 3, 9 and 24, no amendment of

§ 5 being mentioned. Sections 3, 9 and 24 were amended in the body of the act, and also § 5. In a case exactly parallel to this, the supreme court of Kansas held such an amendatory act to be unconstitutional as to the section not mentioned in the title, but constitutional as to the other sections amended where the several sections were not dependent the one upon the other. *State v. Bankers etc. Ass'n,* 23 Kan. 499. Section 5, as sought to be amended by the act of 1905, is in no wise dependent upon the other sections, nor are any of them dependent upon it. We therefore hold that, as to the attempted amendment of § 5, the act of 1905 is unconstitutional, and that as to the remaining sections it is valid.

From this holding, it follows that the original § 5, as contained in the act of 1895, is still in effect, and the bonds to be given by the commissioners should each be $5,000. Nevertheless, the commissioners were *de facto officers,* and having entered into the possession of their offices and upon the discharge of their duties, their acts were not invalid, nor could they be questioned by the relators in this collateral proceeding. 28 Am. & Eng. Ency. Law, 355; 8 Am. & Eng. Ency. Law, 786-787. We have passed upon the constitutionality of the act of 1905 for the reason that we will hereinafter base an argument on § 9, as amended therein.

The relators contend that, after the original petition had been filed, no amendments changing the system proposed by the commissioners could be allowed. We think this objection is entirely too technical, for, while any system proposed by an original petition or an amended petition, upon which a hearing is finally had, should be either adopted or rejected by the court, there is no reason why the petition might not be amended for the purpose of permitting the commissioners to propose a change in the system, provided notice of such amendment be given to all of the defendants, and a full hearing be had on such amended petition. It certainly would save time and expense to amend instead of compelling the peti-

tioners to dismiss and commence an entirely new proceeding.

Upon the hearing there seems to have been considerable contention on the question as to whether the proposed system was more or less feasible than some other system which might have been proposed. The mere fact that some system not proposed might be feasible, does not deprive the court of authority to approve the system actually proposed, if it be feasible and proper, even though it might appear that a system not proposed would in some respects or to some degree be more feasible. The question before the court is whether the system proposed is feasible and substantially complies with the requirements of the statute.

The evidence shows that a dam has been placed across the mouth of the Edison slough, which the relators contend is a navigable stream. It appears that this slough is meandered, but it also appears that, during the greater portion of the year, it is dry except during high tide, at which time it is navigable for a short distance for small craft and floating logs. The dam was evidently built to keep out the high tide, so that the slough might be utilized as a reservoir to receive and hold water from the drainage system until it could be discharged during low tide. The dam was constructed without any authority from the United States government, and the relators contend that it cannot be used in the drainage system as its removal might be ordered by the government authorities. We do not think the evidence shows this North Samish river or Edison slough to be navigable to such an extent as to require the consent of the United States government to its obstruction by a dam.

The objections raised by the relators, which we consider of the most vital importance, are those wherein they contend that the court erred, (1) in overruling their demurrer to the amended petition; and (2) in finding that all the lands, real estate, and premises, sought to be appropriated and acquired for the purpose of rights of way, are necessary for the con-

struction of the improvements sought to be made by the commissioners. From an examination of the entire drainage act of 1895, and the amendments thereto, we conclude it to be the duty of the commissioners of the district to originate and select the proposed system of improvement which is to be submitted to the court, and the act contemplates that they shall submit an entire system, complete in all its details, for the approval or disapproval of the court. We think the petition in this regard, even as amended, is insufficient. From an examination of § 2 of the statute, it will be seen that, when it was proposed to organize the district, the petition for such organization was required to contain a brief description of the proposed system of drainage, designating the point of outlet, the route over which it is to be constructed, together with the proposed spurs and branches, and the termini thereof. Section 9, as amended in 1905, provides for the filing of a petition with the superior court, which shall show that such proposed system of drainage is necessary to drain all of the lands described in the petition, and that all lands sought to be appropriated for said right of way are necessary to be used in the construction and maintenance of the improvements. The petition must set forth the route and termini of this system, with a complete description thereof, together with specifications for its construction, with all necessary plats and plans thereof, with draughts of any artificial appliances or equipment necessary in aid thereof, together with the estimated cost of the proposed improvements and other facts and data.

We think that at no time has the petition, even as amended, given a complete description of the proposed improvement, with specifications for its construction. There can be no misunderstanding as to what the word "specifications" means in this connection. It is here applied to a public improvement, and its use, together with the use of the words "necessary plats and plans," and the further words providing for

draughts of any artificial appliances or equipment necessary in aid of the improvement, together with the estimated cost thereof, indicate that such a system with plans and specifications is to be prepared and submitted in the petition as will enable the commissioners, in the event of its approval and adoption, to proceed by contracting for and constructing the improvement without change. There has been no system with plans and specifications, draughts and drawings, submitted here which would enable the commissioners to proceed with this improvement unless they are to prepare further details, plans and specifications after the court and jury have acted. By section 14 it is provided that, in case the damages or amount of compensation for the right-of-way, together with the estimated cost of the improvement, amount to more than the maximum amount of benefits which will be derived from said improvement, the court shall dismiss the proceedings. The estimated cost of the improvement mentioned in this section undoubtedly means the estimated cost as shown by the petition. There is no showing here of the estimated cost. The engineer who made the plan never made any such estimate, nor was he able to testify what the probable cost would be. The only evidence upon this point was given by one of the commissioners, who was not shown to be an expert or competent to testify, and he made no estimate of the cost of the entire system. Section 18 provides that, after the filing of the certificate with the county auditor, the commissioners of the drainage district shall proceed with the construction of the said improvement, evidently meaning the improvement proposed by the petition. Section 19 provides that the work shall begin at the outlet thereof, and shall be completed towards the terminus of the system with all expedition possible, evidently contemplating that the entire system, as proposed by the petition, shall be speedily completed. But here it is conceded that the commissioners intend to construct only a portion of one ditch. It is further provided by section 19

that no change shall be made in the proposed improvement except on the written consent of all the land owners to be benefited thereby. Without their consent, substantial changes can only be made by filing a new petition, setting forth such proposed changes, and further proceedings must be had upon such petition. This evidently contemplates that the original system proposed in a petition, and approved by the court, shall be followed at all times and that a substantial modification can be made only in the manner provided by the statute.

Farnham, in Vol. 2 of his work on Waters and Watercourses, at § 205, says:

"To make a drainage improvement of any benefit, it must be constructed on a plan that will be effective to the accomplishment of the end in view. Taxpayers have a right to demand that, before the enterprise is entered upon, it shall have been determined to be practicable, and that the general character of the improvement shall be designated. When they are entitled to pass upon the question whether or not the improvement shall be made, they can exercise no intelligent judgment until they know the plan; and, if they are entitled to no voice in the matter, they may make effective opposition in case the plan is defective. They also have a right to have the plans fixed so that no departure from them shall be effected during the progress of the work. The courts will not interfere with a plan which has been adopted in good faith, and which will effect the intended object, although it may not be the best that could be devised."

This language is taken from the chapter on drainage, which includes systems of the character here involved, although it is also applicable to sewerage in cities and other municipalities. In § 210 Mr. Farnham says that,

"Knowledge of what is to be done is a necessary ingredient in passing judgment upon the feasibility of any plan for public improvement. Therefore, it is desirable that the details of an intended improvement should, so far as possible, be worked out and stated in a formal manner before the proposition of its adoption is submitted to the voters, or to the authorities to whom the matter is committed. The taxpayer has

a right to have this done in order that he may know whether to acquiesce in the proceeding, or to take steps to contest it."

In § 211 he also lays down the doctrine that the cost of the improvement must be estimated. This seems to be contemplated by the statute of 1895. In § 212 Mr. Farnham also says the route should be described; in § 213, that the dimensions shall be fixed. We think these principles announced by Mr. Farnham are in direct harmony with the provisions of the statute which we are now considering. In short, our construction is that a duty devolves upon the commissioners to have a full and complete system prepared by a competent surveyor or engineer and draughtsman, whom they are authorized by § 10 to employ; that this system shall be complete, shall contain plans, specifications, details, and estimates, so that, if approved by the court, contracts may be made and the work performed in accordance therewith. It then devolves upon the court to pass upon the practicability of this improvement, as contemplated by § 12, and determine whether the use to be made of the lands sought to be appropriated is a public use, and to empanel a jury to assess the damages and benefits and fix the value of the lands taken. Thereafter it becomes the duty of the commissioners, if the action is not dismissed, to proceed with the improvement in accordance with the plans submitted to and approved by the court, without any substantial change. The petition in this case does not comply with the requirements of the statute, nor does the proof seem to be sufficient to support the findings. The trial court erred in its findings, and in ordering that a jury be empaneled to assess the damages and benefits, and ascertain the value of the property.

It is not necessary that this action should be dismissed and the district dissolved, as demanded by the relators. We see no reason why the respondents should not be permitted to exercise their option of dismissing and commencing a new proceeding, or taking leave to amend their petition herein

within such reasonable time, as they may be able, by an amended petition, to submit to the court a proper system in accordance with the views herein expressed.

It is ordered that the rulings and orders of the trial court be reversed, and that this cause be remanded for further proceedings in accordance with this opinion.

MOUNT, C. J., RUDKIN, FULLERTON, ROOT, DUNBAR, and HADLEY, JJ., concur.

[No. 5876. Decided April 4, 1906.]

SPOKANE TRACTION COMPANY, *Respondent*, v. LOUIS GRANATH *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—SPECIAL BENEFITS—BRIDGES. The building of a bridge and opening of the same for highway purposes is a special benefit to property abutting on the approach, which may be offset against the damages from a change of grade of the street.

SAME—BRIDGE BUILT BY STREET RAILWAY—OFFSET OF BENEFITS. Where a street railway company, under direction of the city, builds a bridge which is to be open to public travel, the special benefits to abutting property may be offset against the damages, as if the city had done the work exclusively for its own benefit.

SAME—EVIDENCE OF SPECIAL BENEFITS—HARMLESS ERROR. Upon an issue as to special benefits to be offset against the damages to abutting property, the admission of evidence improper in form is not prejudicial error when the cause was tried before the court without a jury.

SAME—ALLOWANCE OF DAMAGES—IMPROVEMENTS. In estimating the benefits and damages to property abutting upon an improvement, it is not error to allow damages to the owner of the fee and not allow damages to the owner of the improvements thereon.

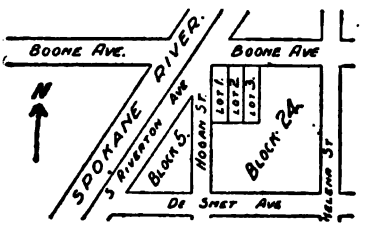
Appeal by defendants from a judgment of the superior court for Spokane county, Huneke, J., entered April 12, 1905, upon findings in favor of the plaintiff, after a trial before the court without a jury, assessing the damages of the defendants from a change in grade, etc. Affirmed.

[1]Reported in 85 Pac. 261.

W. J. Thayer and *A. E. Gallagher,* for appellants.

Graves & Graves and *H. B. Kizer* for respondent.

Root, J.—This action was brought by petitioner, a street railway corporation, to have assessed the amount of damages sustained by appellants by reason of damage to their property caused by improvements which respondent railway company intended to make. The contemplated improvements consisted of the erection of a high bridge upon Boone avenue, over the Spokane river, and the grading of Boone avenue toward the east from said river, in the city of Spokane. The property of appellants is situated on the south side of said avenue, abutting thereon, and close to the river. The following diagram will show the relative positions of the river, streets, lots and blocks, referred to herein.



The grade as constructed by respondent on Boone avenue, east of the river and in front of appellants' property, varied in height from 13.5 feet to 5.4 feet, the highest point of the grade being near the bridge. Prior to the construction of the bridge and grade, appellants' property was on a level with Boone avenue, and with Helena and Hogan and South Riverton streets.

The case was tried before the court, sitting without a jury, and findings of fact and conclusions of law were made and filed. A part of finding numbered 8 reads as follows:

"Block 5 was damaged by the change in the grade of Boone avenue and the construction of the bridge, over and above the benefits accruing to it from said improvement in the sum of

one dollar. Lot 1, in block 24, was damaged by the construction of the bridge and the grading of Boone avenue, over and above the benefits accruing to it from the improvement, in the sum of $90. The fee simple interest in lot 2, in block 24, was damaged by the construction of the bridge and the grading of Boone avenue, over and above the benefits it received from said improvements in the sum of $52.50, while the leasehold interest in said lot 2 was damaged in the sum of one dollar."

In a finding referring to the improvements upon block 5, and lot 1, of block 24, the court said:

"These improvements were not depreciated in value over and above the benefit accruing from the improvement in any sum whatsoever, and therefore I have made no allowances for damages thereto in fixing the amounts above specified."

The principal contention made by the appellants is that the lower court permitted the benefits which accrued to appellants' property by reason of the construction of the bridge across the river to be offset against the damages caused to their property by reason of the grading and filling of the street in front thereof, urging that said benefits were not special but general. It is shown that the construction of this bridge, and the grading and filling of the street in front of said premises, were parts of one and the same plan of the improvement in that vicinity. The city had granted the street railway company an ordinance which required them, upon the construction of their bridge across the river, to maintain the same as a thoroughfare for the use of the public, and required them also to lay their tracks upon Boone avenue, east of the river, so that said tracks would be flush with the grade established for said street. In order to comply with this last mentioned requirement, it was necessary for the railway company to fill in the street extending from the end of the bridge and past the property of the appellants, and further on to make a considerable cut in order to get a practicable grade from the end of said bridge to that portion of the street

lying some distance from the river—there being quite a bluff or elevation extending along the river and some little distance therefrom.

Appellants claim that the building of this bridge and the opening and maintenance of the same for highway purposes was a benefit to their property of the same character enjoyed by property owners generally in all that portion of the city, and for this reason could not be deemed "special," as that term is understood in connection with matters of this kind. We do not think this contention can be upheld. The construction and maintenance of a bridge across the river, with one terminus almost immediately in front of appellants' property, furnished an advantage of access to and from the business portions of the city that was of special value to said property. Doubtless many other pieces of property in that immediate vicinity were likewise specially benefited, but we think that the advantages and the increase of value which would of necessity come to this particular property by reason of the construction and maintenance of said bridge, as aforesaid, was such as to characterize these benefits as special, and such as should be offset against the damages. Not only was the bridge itself a special benefit, but the improvement consisted in so grading the street as to make a thoroughfare past appellants' property to and from the end of the bridge and to that portion of the city lying to the eastward. It is difficult to distinguish this from those cases occurring continually where property is being assessed for the improvement of streets in front of or adjacent thereto.

Appellants urge that the court was in error in permitting the respondent company to amend its petition by striking out the words "irrespective of benefits." Their contention appears to be that, as this work was being done, or to be done, by the railway company, it was not entitled to offset benefits against damages. But the record shows that the work was done by the railway company under the direction, au-

thority and supervision of the city, and for the benefit of the latter as well as the railway company. Under circumstances of this kind, it is in effect the same as if the work was done by the city through a contractor exclusively for its own benefit. This being true, the right to offset benefits cannot be questioned. *Kaufman v. Tacoma etc. R. Co.*, 11 Wash. 632, 40 Pac. 137.

Appellants take exception to the action of the court in overruling objections made to questions asked by respondent relative to the benefits and damages, claiming that said questions were such as to call from the witness an estimate of the entire benefits without reference to their being special or general. While the form of the questions may not have been the most accurate, yet we do not believe any prejudicial error was occasioned thereby. The case having been tried by the court without a jury, it may well be presumed that the court considered and weighed the evidence with reference to those benefits which, under the law, could be deemed special, and it is so reviewed here.

It is urged that the court was in error in not making an allowance for damages to the improvements upon the lots and blocks in question, and it is claimed that damages should have been allowed to the owner of the improvements in the same proportion as was allowed to the owners of the fee. We do not think the record shows any error in this particular. The trial court heard all the evidence and personally viewed the premises. It does not necessarily follow that the improvements would be damaged in the same proportion as the land itself. While the use of the improvements might depend much upon the condition and value of the land, yet as an item of personal property, they could hardly be said to be injured by what took place in the street in front of the real estate, except in an indirect manner. We are not disposed to change the findings of the trial court in this particular.

In support of our conclusion as to what constitutes special

benefits in cases of this character, we call attention to the following cases:

Lewis v. Seattle, 5 Wash. 741, 32 Pac. 794, where this court, among other things, said:

"It is generally held that only such benefits as are special and peculiar to the particular property can be taken into consideration. But the laying out or widening of a street may be a special benefit to the property abutting thereon, and this benefit may be offset against the damages to the owner whose land is taken therefor, although parties upon the opposite side of the street are similarly benefited and are not chargeable therewith, for the reason that none of their lands were appropriated and no damages were claimed by them."

Hilbourne v. Suffolk, 120 Mass. 393, 21 Am. Rep. 522, where it was said:

"The advantages that an abutter may receive from his location on a highway laid out, altered or widened, are none the less peculiar and special to him because other estates on the street receive special and peculiar benefits of a similar kind. *Allen v. Charlestown,* 109 Mass. 243. The ruling in that case, held to be bad, was that if all the estates abutting on the street are benefited in a similar manner, the amount of his benefits cannot be deducted from the damages of any abutter."

Metropolitan etc. R. Co. v. Stickney, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773, where this language was employed:

"If a piece of property is enhanced in value, such enhancement—or, in other words, benefit to the property, cannot be said to be common to any other piece of property. Each piece of property specially enhanced in value is thus specially benefited within itself, and irrespective of the benefit that may be conferred by the improvement upon other properties. It follows, necessarily, that where the benefits are designated as 'general benefits,' 'benefits common to other property,' and the like expressions, to be found in decided cases, it is meant those general, intangible benefits which are supposed to flow to the general public from a public improvement. Thus, the paving of a street in a city may confer

special benefits upon properties near it by an increase in their value, and at the same time, by the convenience afforded the general public, confer a general benefit. So a railroad built through a town or through the country may be a general benefit, by affording additional facilities for travel and commerce, and thereby be a benefit to the community at large. But the effect of such general benefits upon any particular piece of property would be impossible of ascertainment, and speculative, and it has always been held that such benefits are not to be considered for that reason."

Kirkendall v. Omaha, 39 Neb. 1, 57 N. W. 752, where the supreme court of Nebraska spoke as follows:

"The word 'common' is ordinarily understood to apply to the general public, when not qualified by some word or phrase of limitation. The term 'general benefits,' when unqualified, should probably be accepted in the same sense as the term 'common benefits'; that is to say, when there is no limitation expressed, it should be deemed applicable to the general public, rather than as embracing as general but a limited part of the public. . . . The term 'special benefits' implies benefits, such as are conferred specially upon private property by public improvement, as distinguished from such benefits as the general public is entitled to receive therefrom. . . . If the improvement should result in an increase in the value to adjacent property, which increase is enjoyed by other adjacent property owners as to the property of each exclusively, the benefit is special; and it is none the less so because several adjacent lot owners derive in like manner special benefits each to his own individual property."

We think the findings of the trial court are sustained by the evidence, and that the conclusions based thereupon were correct.

No reversible error appearing in the record, the judgment of the superior court is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, DUNBAR, CROW, and RUDKIN, JJ., concur.

[No. 5849. Decided April 5, 1906.]

F. M. VAN HORN *et al.*, *Appellants*, v. JOHN O'CONNOR *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—RESCISSION FOR FRAUD OF VENDOR—MISREPRESENTATIONS—EXPRESSIONS OF OPINION—INSPECTION BY VENDEE—NONSUIT. In an action by a vendee of a half section of farm land, to recover damages for the fraud of the vendor in misrepresenting the number of tillable acres of land, a nonsuit is properly granted upon the testimony of the plaintiff, where it appeared therefrom that he had twice inspected and driven over the land, that the vendor and his agent, who were strangers to him, had represented that there were 240 acres of land under cultivation, and twenty-five or thirty more that could be cultivated, and it did not appear that the cultivated land had ever been measured, and the purchaser received all the land shown him, although the vendor said that he thought that part of the bad land included within the fence was beyond the boundary line.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered June 3, 1905, upon granting a nonsuit in an action to recover damages for the fraud of a vendor in the sale of lands. Affirmed.

J. T. Mulligan and *H. N. Martin*, for appellants.

Merritt & Merritt, for respondents.

MOUNT, C. J.—This action was brought by appellants, to recover damages from respondents on account of alleged false and fraudulent representations in regard to the sale of certain real estate. These representations are alleged to have been made by respondents O'Connor and Lee, and relied upon by appellants. Upon issues of fact made by the pleadings, the cause came on for trial to the court and a jury. After the plaintiff F. M. Van Horn had given his testimony, the trial court took the case from the jury, upon motion of the respondents. This appeal is from the judgment of dismissal.

[1]Reported in 85 Pac. 260.

Mr. Van Horn's testimony was in substance, that on June 7, 1904, he went with Mr. O'Connor to look at a half section of land owned by Mr. O'Connor in Lincoln county. They looked over the land on that day, when Mr. O'Connor represented that there were two hundred and forty acres of the land in cultivation. After looking at the land on that day, they returned to the town of Downs, near by, where Mr. O'Connor introduced Mr. Van Horn to one F. C. Lee, and then told Mr. Lee that he and Mr. Van Horn had been out to look at the land, and said to Mr. Van Horn: "Mr. Lee can tell you as much about the Lyman place as I can. He has sowed the place and headed the place, and knows what there is of it." Mr. Lee thereupon told Mr. Van Horn, that there were two hundred and forty acres of the land under cultivation; that there were some thirty acres more which could be cultivated, and that there would be not over fifty or sixty acres of waste land. These statements corroborated what Mr. O'Connor had theretofore told Mr. Van Horn. No agreement upon the price of the land was reached that day.

On June 10, 1904, Mr. O'Connor and Mr. Van Horn again went to examine the land. There was a fence around the whole section, but no dividing fence. They drove along the north line to about the center of the section, and then followed the supposed half section line south to where Mr. O'Connor said the corner ought to be. They did not go as far as the south fence on that side of the section because Mr. O'Conner said he thought the fence was beyond the line, and was built through the rocks for convenience in fencing, and that the bad land which was between them and the fence was not upon the half section. They did not find the corner of the half section. Mr. O'Connor thereupon said it must have been moved or taken away. After looking around at the land, they returned to Downs. On the way back Mr. O'Connor again said that there were two hundred and forty, or two hundred and forty-one acres of land under cultivation,

and twenty-five or thirty acres more which could be broken up, and which would make two hundred and seventy acres of good farm land on the half section. After they returned to Downs, Mr. Van Horn asked Mr. Lee if he was to get anything out of the sale, and Mr. Lee told him, "Not from you. Mr. O'Connor pays me." In the evening of June 10, Mr. Van Horn traded to Mr. O'Connor Spokane city property for the half section of land, at an agreed price of $6,400.

After he had purchased the land, Mr. Van Horn discovered that the fence on the south side of the half section was located upon the south line. The court refused to receive evidence as to how many acres of the land were tillable. On cross-examination, Mr. Van Horn stated that he had never met Mr. O'Connor until about the 1st day of June, 1904; that he was desirous of trading Spokane property for farm lands, and went to see Mr. O'Connor for that purpose, and had no other dealings or relations with him; that he had never met Mr. Lee until the 7th of June, 1904, and had no other dealings with him. Upon the facts as stated above, the lower court was of the opinion, that there were no confidential relations existing between Mr. O'Connor or Mr. Lee and Mr. Van Horn; that the representations made were expressions of opinion about facts which were as open and obvious to the appellant as to the respondents, and that appellant had an opportunity to obtain the facts about which representations were made, and for that reason dismissed the action.

It is clear from appellant F. M. Van Horn's evidence that he obtained all the land which was shown him, and some which was stated did not go with the half section purchased. But the important and controlling question in the case is whether, after examining the land, appellant may complain because there is not as much tillable land as was represented by the respondents. This court has frequently held that, where representations are made as a matter of opinion, there is no liability for misrepresentations, where the parties are

dealing at arm's length and the means of knowledge are as open to one party as to the other. *Hulet v. Achey,* 39 Wash. 91, 80 Pac. 1105; *Lawson v. Vernon,* 38 Wash. 422, 80 Pac. 559; *Daniel v. Glidden,* 38 Wash. 556, 80 Pac. 811, and cases there cited.

But, where the representations made are of material facts within the knowledge of the vendor, and entirely without the knowledge of the vendee, and where the circumstances are such as reasonably call for a reliance thereon, the rule is that the vendee may rely upon the representations of the vendor. *Daniel v. Glidden, supra; Lawson v. Vernon, supra; Baker v. Bicknell,* 14 Wash. 29, 44 Pac. 107; *Sears v. Stinson,* 3 Wash. 615, 29 Pac. 205; *Hanson v. Tompkins,* 2 Wash. 508, 27 Pac. 73. In the last named case this court held that, where the vendor represented that a tract of land contained thirty-six and one-half acres, when as a matter of fact it contained only twenty-six and one-half acres, the vendor was guilty of deceit, where he did not know but believed the representations were true. The same rule was followed in *Sears v. Stinson, supra.*

These cases are relied upon by the appellants, but it does not appear in either of them that the vendee to whom the land was sold had an opportunity to make an examination, or that he did so. On the other hand, it appears that the vendee relied wholly upon the representations of the vendor; and it further appears in *Hanson v. Tompkins* that it was the intention of the parties to convey forty acres of land, and that a less number of acres was actually conveyed. The case of *Baker v. Bicknell, supra,* seems to be squarely in point, and decisive of the case before us. According to the appellant's evidence, which must be taken as true on this appeal, both Mr. Lee and Mr. O'Connor represented that there were two hundred and forty acres of land in cultivation upon the half section. They stated at the same time that there were twenty-five or thirty acres more that could be put into cultivation, and not to exceed fifty or sixty acres of waste land out of the three hundred and twenty acres. These two latter

statements were clearly expressions of opinion and, being so, indicate that the exact number of acres in cultivation was also unknown to them, and that the statement that there were two hundred and forty acres in cultivation was more in the nature of an estimate than of a warranty. There appears to be no claim that the land under cultivation had ever been measured by the vendor, or that he or his agent, Mr. Lee, knew or claimed to know the exact number of acres. The appellant stated, in one part of his examination, that Mr. O'Connor said there were two hundred and forty or two hundred and forty-one acres, indicating again very clearly that Mr. O'Connor was merely estimating the number of acres. The land was open and plainly subject to inspection or measurement. The appellant viewed it twice. He was presumably competent to estimate the area before him as well as the respondents. The parties were strangers to each other, and dealing with each other at arm's length. Appellant does not claim that he received less land than he agreed to purchase, but only that a portion of it was not of the quality which he desired it should be. The trial court saw and heard the complaining witness testify, and concluded from his own evidence that the representations made to him were expressions of opinion. We think the court was justified in so doing.

The judgment is therefore affirmed.

DUNBAR, CROW, HADLEY, RUDKIN, ROOT, and FULLERTON, JJ., concur.

[No. 6001. Decided April 5, 1906.]

EDWARD MOSLEY, *Respondent*, v. ALBERT DONNELL, *Appellant*.[1]

PROCESS—SUMMONS—SUFFICIENCY OF AFFIDAVIT FOR PUBLICATION. An affidavit for a summons for publication is sufficient although it states conclusions instead of probative facts.

FRAUD—OBTAINING MONEY THROUGH FALSE PRACTICES OF WIFE—EVIDENCE—SUFFICIENCY. There is sufficient evidence that the defendant was a party to the fraud whereby his wife obtained possession of plaintiff's money, where it appears, that plaintiff and defendant were fellow workmen at a smelter; that the defendant was the only person who knew that the plaintiff was to leave on a certain train, with $600 to invest in real estate; that defendant's wife preceded plaintiff to said train, and was introduced to him under a false name, and induced him to loan the money by giving him a mortgage on real estate which she did not own, shortly after transferring other property to her husband without consideration and leaving the state; and where the defendant received part of the money, soon left the state, and his evidence is equivocal and contradictory.

Appeal from a judgment of the superior court for Stevens county, Huneke, J., entered July 6, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover money fraudulently obtained. Affirmed.

Robertson, Miller & Rosenhaupt, and *F. Y. Wilson*, for appellant.

Kellogg & Neal, for respondent.

MOUNT, C. J.—Respondent brought this action against the defendants to recover the sum of $600, alleged to have been fraudulently obtained from him by the defendants, and to set aside a deed of certain lots in the town of Northport, from Louella Donnell to Albert Donnell, her husband, on the ground of fraud, and to subject said lots to the payment of plaintiff's claim. At the time the action was brought, a writ of

[1]Reported in 85 Pac. 259.

attachment was sued out and levied upon the said lots. Summons was served upon the defendants by publication. The appellant Albert Donnell appeared specially, and moved the court to quash the service of the summons. This motion was denied, and appellant then filed an answer, denying the allegations of the complaint. The defendant Louella Donnell made no appearance, and judgment was entered against her by default. The cause was tried to the court without a jury, and findings were made in favor of the plaintiff, and a decree entered as prayed for in the complaint. The defendant Albert Donnell appeals.

The facts are substantially as follows: In the year 1903, all the parties hereto were residents of the town of Northport, in this state. The plaintiff was a man fifty-two years of age. He and appellant were fellow workmen in the Northport smelter, where they had been employed for about two years. They met about their work every day. Appellant was married to the defendant Louella Donnell, who was a common prostitute in the town of Northport. The plaintiff had never met Mrs. Donnell. About the 1st of December, 1903, the plaintiff had accumulated about $600 in money, which he desired to invest in farm lands in Lincoln county. He had informed the appellant of his intentions. About the 1st day of December, 1903, he went to the train at Northport, intending to go to Hartline, in Lincoln county, for the purpose of investing his money. An acquaintance met him at the depot and went on the train with him and introduced him to appellant's wife, stating that her name was Lou Blake Murray, and that she resided in Nelson, British Columbia. At her invitation plaintiff sat in the seat beside her from Northport to Spokane. On the way to Spokane Mrs. Donnell stated that she owned some timber land in Idaho, and was on her way to look at it, and invited plaintiff to go along with her. He consented, and they went to the land and looked it over. After they had examined the land, Mrs. Donnell proposed to

borrow $600 from the plaintiff, and stated that she would give him a mortgage on the land to secure the repayment of the money. Plaintiff, relying upon her representations that she owned the land, made the loan and took her note and mortgage for the $600. Mrs. Donnell thereupon returned to Northport, gave her husband a part of the money, and deeded two lots in Northport to her husband without consideration, and departed for British Columbia. A day or two later the plaintiff discovered that Mrs. Donnell was the wife of the appellant, and that she had no interest in the land upon which she had given him a mortgage. The appellant Albert Donnell soon thereafter left Northport, and went to British Columbia. Plaintiff thereupon brought this action.

Appellant contends, first, that the affidavit for publication is insufficient. The affidavit in this case is substantially the same as the one in *Goore v. Goore,* 24 Wash. 139, 63 Pac. 1092, which we held sufficient.

Assignments are made that the evidence is not sufficient to support several of the findings of fact. Each of these assignments is argued separately in the brief. It is unnecessary for us to consider them separately. The evidence is clear and positive to the point that the appellant's wife, by misrepresentation and fraud, obtained respondent's money. There is no direct and positive evidence that the appellant was a party to the fraud, but the circumstances surrounding the case point very closely to the fact that the appellant himself instigated the fraud and was a party to it and received a portion of the proceeds. He was the only person who knew that respondent had the money, and was going to Spokane with it at the time stated. Appellant's wife went to the train that morning ahead of respondent, and was introduced as another person by a mutual friend. She obtained the money fraudulently and came back to Northport, where she attempted to place her property there out of the reach of respondent by deeding it to her husband. She gave a part of the proceeds to her hus-

band, and then left the state. The appellant soon followed. The appellant testified in the case in his own behalf, and his evidence as we read it is very unsatisfactory. It is equivocal and contradictory, and does not appeal to us as the evidence of an innocent person. The trial court was abundantly justified in its conclusion, and we think the judgment entered is in accordance with the justice of the case.

The judgment is therefore affirmed.

DUNBAR, HADLEY, RUDKIN, CROW, FULLERTON, and ROOT, JJ., concur.

[No. 5982. Decided April 6, 1906.]

THE STATE OF WASHINGTON, *on the Relation of John L. Thomas et al., Plaintiff,* v. THE SUPERIOR COURT FOR WHATCOM COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN—PUBLIC USE—STREETS—LAND OWNED BY CITY—ESTOPPEL. It cannot be claimed that the taking of land by a city for the extension of a public street is not a public use because of the fact that the city already owns certain land necessary to complete the extension, and which has not been formally dedicated and is not mentioned in the proceedings; since the city would be estopped to claim that its land necessary therefor was not to be used or dedicated.

SAME—CUL DE SAC AS STREET—COURTS—LEGISLATIVE FUNCTION. The establishment by the city authorities of a *cul de sac* as a public thoroughfare, is a legislative function with which the courts will not interfere.

SAME—PUBLIC USE. The use of property for a public street is necessarily a public use.

SAME—PAYMENT OF DAMAGES—MUNICIPAL INDEBTEDNESS—LIABILITY OF CITY. Upon a proceeding by a city to condemn lands for a public street, the same to be paid by assessment upon property specially benefited, if sufficient can be raised in that way, any inquiry as to the amount of the city indebtedness is immaterial; especially where the city has taken a penal bond from interested owners, conditioned that the city will not be called upon to pay any portion of the expense.

1Reported in 85 Pac. 256.

SAME—PROCESS—PERSONAL SERVICE OUTSIDE OF STATE. In proceedings to condemn land for a public street, personal service on a nonresident defendant outside of the state, in lieu of service by publication, is authorized by Laws 1905, p. 86, providing for service as in civil actions, and Bal. Code, § 4879, providing that personal service outside the state shall be equivalent to service by publication.

SAME—PROOF OF SERVICE. Proof of service of a summons upon the defendants is sufficient where there were two affidavits, one of which showed a service on both defendants, the second affidavit showing that the party making the service was qualified.

Certiorari to review a judgment of the superior court for Whatcom county, Neterer, J., entered November 14, 1905, adjudging a public use and ordering an assessment of damages for lands taken for the purpose of a public street. Affirmed.

Kindall & Kenyon and *Dorr & Hadley,* for petitioners.

Fairchild & Bruce, for respondents.

CROW, J.—This is a certiorari proceeding, instituted for the purpose of having this court review the orders of the superior court of Whatcom county, in an action for the condemnation of private property.

On April 10, 1905, the council of the city of Bellingham passed ordinance No. 139, entitled:

"An ordinance providing for the laying off, widening and establishing of Prospect street, a public street and highway in the city of Bellingham, over and across portions of blocks 11, 12, 14 and 19, Central Whatcom; providing for the laying out, extending and establishing said Prospect street through block 7, New Whatcom, and providing for the taking and damaging of land and other property necessary therefor and for the ascertainment and payment of just compensation to be made for the private property to be taken and damaged for said purposes and for the assessment upon the property benefited for the purpose of making such compensations."

Afterwards the city attorney, under authority of said ordinance, filed a petition in the superior court of Whatcom county, as required by § 3 of chapter 55, Laws 1905, page 86,

praying that just compensation be made for private property to be taken or damaged for the laying off, widening, extending and establishing of Prospect street as provided by said ordinance, and that a jury be impaneled for that purpose. Prospect street, as at present dedicated and opened, extends from the northern portion of the city of Bellingham in a southerly direction to Champion street, where it terminates near the center of the north line of block 7 hereinafter mentioned. Immediately south of Champion street, and abutting thereon, is block 7, of the city of New Whatcom, now a part of Bellingham. This block, triangular in form, and subdivided into lots, is bounded on the north by Champion street running east and west, on its southeasterly side by Bay street running from northeast to southwest, and on its southwesterly side by Holly street running from northwest to southeast. Bay and Holly streets intersect each other at the south angle of block 7, and respectively intersect Champion street at the east and west angles of said block 7. The city buildings and central fire station are located on Prospect street about one block north of Champion street. Block 7 lies between the end of Prospect street and the business center of the city, to which at present the most direct route of travel is around Champion and Bay streets. The city wishes not only to widen Prospect street, but also to extend it across said triangular block 7 to Bay street, thus making a wider and more direct thoroughfare to the business center. The city now owns the southwest thirty feet of lot 11 in block 7, directly in the line of the proposed extension of Prospect street. Ordinance 139 does not provide for any condemnation of said thirty feet, nor has any formal record of its dedication been made. If the street when extended is not opened through said thirty feet, one *cul de sac* will be formed in the north side and another in the south side of block 7, with said thirty feet lying between them. The relators own that portion of block 7 sought to be condemned south of the thirty feet owned by the city. The superior court made findings of fact and

conclusions of law in favor of the city, and ordered a jury to be impaneled to fix values and assess damages.

The relators' first contention is that the proposed appropriation of their lands is not a public use. They insist that neither the ordinance nor the condemnation proceedings attempt to appropriate said southwest thirty feet of lot 7, and cannot be regarded as proceedings for that purpose; that no dedication of said thirty feet has been made; that the city is only endeavoring to create one *cul de sac* next to Champion street and another next to Bay street, and that any appropriation for such a purpose cannot be a public use. We think these contentions are entirely without merit. The record shows a sincere intention upon the part of the city to actually open Prospect street entirely across block 7, and to condemn all *private* property that may be necessary for that purpose. The southwest thirty feet of lot 11, however, is not private, but public property. If it belonged to the county or state, it might perhaps be necessary to condemn it; but as it belongs to the city, its condemnation is unnecessary. Although no record of any formal dedication of said thirty feet has been made for street purposes, yet if the city proceeds with the proposed improvement and pays the relators all damages that may be awarded them, we think that, in the light of the ordinance, the condemnation petition, the evidence, and the entire record before us, it will be estopped from claiming that its own property has not been dedicated. 13 Cyc., 453, 454.

But, suppose it be admitted, as contended by the relators, that the city is only creating a *cul de sac,* yet it would have authority to establish a thoroughfare in the form of a *cul de sac* on either side of its property, if it saw fit to do so. It would be a legislative function, with the exercise of which the courts could not interfere, for the city to determine that such additional access to its property was a public necessity. *Sheafe v. People ex rel. Olwell,* 87 Ill. 189, 29 Am. Rep. 49; *People ex rel. Williams v. Kingman,* 24 N. Y. 599. But we

think the city is not creating any *cul de sac*. The evidence shows beyond question that it is about to open a much-needed thoroughfare across block 7. There is no merit in the relators' contention that the use to be made of their lands sought to be appropriated is not public. The use of property for a street or highway is necessarily public, and the trial court could not find otherwise.

"One of the oldest and commonest of uses for which private property has been appropriated is the establishment of public highways. The apprporiation of private property for the establishment of such highways has been held uniformly to be for a public use." 10 Am. & Eng. Ency. Law (2d ed.), 1072.

See, also, *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1, 69 Pac. 366; *Chicago etc. R. Co. v. Town of Lake*, 71 Ill. 333.

Upon the hearing the trial court excluded evidence offered by the relators for the purpose of showing that the city of Bellingham at the time of the institution of the condemnation proceedings, and at the time of the hearing was indebted in excess of the constitutional limit, and they now assign error upon said ruling. The ordinance in § 4 provides that an assessment shall be made in the manner provided by the act of the legislature for the purpose of raising the amount necessary to pay the compensation and damages which shall be awarded for the property taken, and for the costs and proceedings, and that such assessment shall be made subject to the provisions of said act of the legislature upon all the property, especially benefited. The ordinance in a later section provides that "any part of the compensation, damages or costs that is not finally assessed against said property benefited shall be paid from the general fund of the city." The relators contend that by this last provision the city will necessarily incur an invalid indebtedness, having already exceeded its constitutional limitation. Any inquiry into the amount of the city debt is immaterial in this proceeding. The prop-

erty of the relators cannot be taken by the city until actual compensation has been made. The relators are in no position to raise any question as to the limit of the municipal debt, nor are they justified in assuming that any unconstitutional indebtedness will be incurred. It is apparent from the entire ordinance that an intention exists on the part of the city to pay for property taken by special assessments made upon property benefited, and such intention brings this case within the rule laid down in *Winston v. Spokane,* 12 Wash. 524, 41 Pac. 888, and *Faulkner v. Seattle,* 19 Wash. 320, 53 Pac. 365. To meet any suggestion that the city's credit may be menaced by this proceeding, the council have not only provided in the ordinance for special assessments to pay for the lands to be taken, but the evidence shows they have also taken a penal bond from interested property owners conditioned that the city shall not be called upon to contribute any funds to the expense of the improvement. In *Faulkner v. Seattle, supra,* this court said:

"It is also urged that as the fund is not now in existence and as the city is proposing to acquire rights of way and property rights prior to the creation of the fund, this would be a violation of the provision with reference to its debt limit, but that does not follow necessarily. There may be some method for immediate payment provided for property condemned, or an agreement possibly postponing and limiting payment to the fund contemplated under the contract for the construction of the works. If the city should wrongfully attempt to make payment for rights of way out of its general fund, the parties holding claims against that fund possibly could interfere, but it is not apparent that there is any intention to deplete this fund."

The taking of the bond discloses that the city authorities have already adopted "some method for immediate payment for property condemned." The trial court committed no error in rejecting the evidence offered.

It appears that relators, George A. Green and Annah S. Green, his wife, being nonresidents of the state of Washing-

ton, were first served by publication, and afterwards by personal service without the state. They only made a special appearance, moving the court to quash such service. This motion being denied, they now assign error, and claim that the service by publication was insufficient for the want of a proper affidavit. This may be conceded for the purposes of this case. As to the personal service outside of this state, they claim, (1) that no authority exists for any such service in a proceeding of this character, and (2) that if such authority does exist, a valid personal service outside of the state has not been made. There is no merit in either of these contentions. Section 5 of the act of 1905, at page 86, provides that "upon the filing of the petition aforesaid, a summons returnable as summons in other civil actions, shall be issued and served upon the persons made parties defendant, together with a copy of the petition as in other civil actions." The code of civil procedure, Bal. Code, § 4879, authorizes personal service on a defendant out of the state, and provides that the same shall be equivalent to service by publication. We think these two sections authorize personal service on a defendant out of the state in this proceeding. Relators also object to the proof of service, because it does not show a copy of the petition and summons to have been served upon each of the relators, Green and wife. There are two affidavits making proof of service. In the first, it affirmatively appears that copies of the petition and summons were left with each of said relators. The second affidavit was made to show that the party who made the service was qualified. These two affidavits are sufficient proof of a valid service, none of their statements being denied by the relators. *Jennings v. Rocky Bar Gold Min. Co.*, 29 Wash. 726, 70 Pac. 136; *Hunter v. Wenatchee Land Co.*, 36 Wash. 541, 79 Pac. 40.

The judgment of the superior court is affirmed.

MOUNT, C. J., ROOT, HADLEY, FULLERTON, and DUNBAR, JJ., concur.

[No. 5955. Decided April 6, 1906.]

C. H. SPALDING *et al., Respondents,* v. WILLIAM O. LEWIS, *Appellant.*[1]

ACCOUNTING—DECEIT IN SALE OF LANDS—ACTION BY JOINT OWNERS TO RECOVER PRICE RECEIVED—CONTRACTS—CONSTRUCTION—BASIS FOR COMPUTATION. Where one of the joint owners of land negotiated a trade of the land for stock in a corporation, whereby he accounted to his co-owners, and they consented to the trade, upon the basis of a valuation of $25 per acre for the land, and the stock at par value, it is error, in an action for an accounting, to give his co-owners judgment against him figured on the basis of $27.50 per acre for their shares, upon its developing that in the trade made by him the land was valued at $27.50 per acre and the stock at par, he paying the vendor a bonus of $4,280 out of his own pocket, and where it was conceded that the stock was not worth par, or the land $25 per acre, and where the defendant offered to share equally the stock actually received, in case his co-owners would pay their share of the bonus paid by him in the trade; and the plaintiffs not electing to recover actual damages sustained by the deceit, must either share in the contract as made or abide the result.

Appeal from a judgment of the superior court for Adams county, Warren, J., entered June 9, 1905, upon findings in favor of the plaintiffs, after a trial on the merits, in an action for an accounting of profits received in a trade. Reversed.

O. B. Holcomb, for appellant.

Merritt & Merritt, for respondents.

PER CURIAM.—The appellant and the respondents were the owners as tenants in common of a tract of land situated in Adams county, containing 1120 acres. The land was encumbered by mortgage in the sum of $17,000. The appellant, Lewis, was desirous of selling the land, and his co-owners expressed to him their willingness to do so, provided a purchaser could be found who would take it on satisfactory terms. Later on Mr. Lewis reported to the respondents that the land could be traded to one W. W. King for shares of stock in

[1]Reported in 85 Pac. 255.

the King Mercantile Company, a corporation doing a mercantile business. King owned, of the corporation's stock, shares of the par value of $18,180, and offered to trade his entire holdings for the land and a bonus of $4,280 in cash; he agreeing to assume the incumbrances on the land. As a basis for making the trade, the land was valued at $27.50 per acre, and the stock at its par value. Mr. Lewis says that, after he received this proposition from Mr. King, he made the same known to the respondents, telling them at the same time that Mr. King would not make the trade unless all of the stock he held in the corporation was taken up, and that it would be necessary to pay King the sum of $4,280 in cash to consummate the trade. He says further that the respondents refused to advance any cash to further the trade, or to take stock in excess of the amount they would receive for their interests in the land; but that, after considerable negotiation, they agreed that, if the crop could be retained and the land valued at twenty-five dollars an acre, they would trade their interests for the stock valued at par. He then says that he made the trade on the terms proposed by King, paying the cash bonus of $4,280 out of his own funds, and afterwards accounted to the respondents for their interests in the property at the rate agreed upon, turning over to them shares of stock of the par value of $7,333.33.

The respondents, however, testify that the appellant told them while the trade was in process of consummation that all that King offered for the land was $25 per acre in stock at its par value, and that nothing was said about the bonus of $4,280 or the fact that the trade was actually being made on a basis of $27.50 per acre; that they first learned these facts from King long after the trade, and that the appellant only admitted them when they went to him after learning the facts from King. They admit, however, that the appellant offered, in case they did not believe they had received their due share of the stock, to divide the whole number of

shares received in the trade evenly between them if they would pay their proportion of the cash bonus given King.

The respondents brought this action on the theory that the appellant had actually received $27.50 per acre for the land, instead of $25 per acre for which he accounted, and that they were entitled to an accounting for the difference. The trial court took this view of the case, holding that the appellant had failed to account for 1886 2-3 shares, which, at 60 cents per share, being the value per share found by it, amounted to $1,120, in which sum it entered judgment in their favor.

The appellant complains of the action of the court, we think justly. As we say, it proceeded on the theory that the appellant had received $27.50 per acre for the land, fraudulently concealed this fact from the respondents, and thereby induced them to part with their interest in the land at $25 per acre. Had the land been worth $27.50 per acre, or had the stock been worth par, there would doubtless have been some foundation for the court's conclusion, but neither of these conditions were true in fact. While the court excluded all direct evidence as to the value of the land, enough does appear to show that even $25 per acre was considerably in excess of its real value. King says that both the land and the stock were valued for the purposes of the trade for more than either was worth; the appellant says the actual value received for the land was about $22 per acre; and the respondents themselves in their complaint allege that the stock was worth but 80 cents on the dollar, yet they were willing, and did actually trade their interest in the land at a valuation of $25 per acre for the stock at par. As to the stock, King says it was worth about 75 cents on the dollar; the appellant 50 or 60 cents, and the court itself found it to be worth but 60 cents. This being true it is plain that the judgment entered by the court is much too large, conceding that the respondents are entitled to recover at all. It is too large because it in effect compels the appellant to take stock at par for the cash he was compelled to pay to complete the trade,

while it is conceded by all the parties, even the court itself, that the stock was worth much less than par. True, the respondents seek to justify this by saying that the purchase by the appellant of the stock over and above what the land paid for was a separate transaction with which the respondents had nothing to do, but this is not the fact. It was all one transaction. The land and the money paid for the stock, and there is no means of finding out from the evidence in this record what part of the stock was purchased with money and what with the land.

It must be remembered that the respondents are not entitled to recover on the principle that the appellant violated his contract with them. This he did not do. They agreed to take this stock at par in payment for their interests in the land at a valuation of $25 per acre. This much they received. They seek to recover more on the principle, as we have stated, that the appellant deceived them. But because he deceived them, they are not entitled to make a new contract with him. They must confine themselves to an action of damages for the deceit, or an equitable proceeding to compel the appellant to permit them to share in the contract he actually made. The action they brought was of the latter nature, and the relief they can obtain in this action is the right to share in the contract as made. But the record shows that the appellant has been willing at all times to share with them the stock he received in the trade if they would assume their part of the burden. He offered before this suit was begun to transfer to them a full two-thirds of all the stock received on their paying two-thirds of the money he was compelled to pay in the trade. In his answer he repeated his offer, and he brought the stock into court and tendered it again at the time of the trial. And since the respondents did not seek relief by way of damages, they should have been compelled to accept the contract as made by the appellant, or abide by their own contract. The judgment of the court does neither and hence must be reversed.

The order of the court will be, therefore, that the judgment appealed from be reversed, and the cause remanded with instructions to permit the respondents, if they so elect within sixty days after the remittitur reaches the trial court, to pay into court for the appellant two-thirds of $1,280, and receive stock in addition to the amount they have already received, sufficient to make two-thirds of the entire amount obtained in the exchange which is the subject of controversy in this action; and if they fail to pay said sum into court within the time named, that their action be dismissed with costs to the appellant.

[No. 5937. Decided April 11, 1906.]

M. A. Kuehn, *Respondent*, v. Fred Dix, *Appellant*.[1]

Negligence—Fires—Adjoining Land Owners—Failure to Prevent Spread of Fire—Evidence—Sufficiency. Findings that an adjoining landowner was negligent in not taking proper precautions to prevent the spreading of a fire set out upon his land, rendering him liable for injury to his neighbor, under Bal. Code, § 3138, are sustained by evidence to the effect that he started the fire at the driest time of the year, and frequently left home, leaving no one to guard the fire or prevent its spreading.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered June 9, 1905, upon findings in favor of the plaintiff after a trial before the court without a jury, in an action to recover damages from a fire set out by an adjoining landowner. Affirmed.

Lewis C. Jesseph, for appellant.

W. H. Jackson and *S. & J. W. Douglas*, for respondent.

Crow, J.—This action was commenced in the superior court of Stevens county, by the respondent, M. A. Kuehn, against the appellant, Fred Dix, to recover damages sustained

[1]Reported in 85 Pac. 43.

by the destruction of her crops and injury to her land by fire. Respondent's land lies immediately north of, and contiguous to, that of appellant. A large portion of the appellant's and respondent's ranches consists of low bottom land, the soil being formed from decomposed roots, willows, grass, tules, and other vegetation. During a portion of the year these lands are under water, which runs off during the summer months and harvesting season, leaving the surface dry. The soil, by reason of its composition, is combustible, and when once ignited during a dry season is liable to burn below the surface, smouldering and extending from one point to another. Often it will continue to burn until it reaches water level, some distance below the surface. The burning of this soil causes permanent injury to the land.

Some time near the latter part of August, or early in September, 1904, appellant started a fire upon his own land for the purpose of burning brush. Respondent contended that appellant negligently allowed this fire to continue throughout the month of September; that about the 3d day of October a heavy wind caused it to rapidly spread over respondent's place and destroy a large amount of hay, and also injure her land; that the appellant had negligently set out said fire, and had also negligently failed to take proper precautions to prevent its spreading and damaging the respondent's land and crops.

The appellant conceded that he started the brush fire about the 1st of September, and that during that month certain other fires were upon his land. He contended, however, that the brush fire had entirely subsided; that he had successfully used all necessary precautions to prevent the spread of any other fires from his land; that all of said fires had ceased to exist prior to October, and that the fire which had spread over respondent's land came from the place of one Jarvis, and not from appellant's. The court, upon trial without a jury, made findings of fact from which it appears that the

appellant was not originally negligent in setting out the fire upon his own land, but that he was afterwards negligent in not taking proper precautions to prevent its spreading upon the respondent's land; that by reason of such negligence it did spread over her land, and that she had sustained damages. From a judgment in favor of respondent, this appeal has been taken.

The appellant contends that the court erred in denying his motion for a nonsuit, and in rendering judgment for respondent. The appellant has presented a very exhaustive and well prepared brief, raising numerous legal questions on the law of fires, which we think it unnecessary to consider, as the controlling questions before us arise entirely on issues of fact, under the provisions of Bal. Code, § 3138, which reads as follows:

"If any person shall for any lawful purpose kindle a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful man would do, and if he fail so to do he shall be liable in an action to any person suffering damage thereby to the full amount of such damage."

Although the trial court found appellant was not negligent in starting a fire upon his own land, still he would be liable if he did not take such care of his fires as a prudent and careful man would, to prevent them from spreading and doing damage to respondent's property. He contends that he did take all such necessary precautions, but upon this question the evidence is conflicting. The court found him to have been negligent in this regard. From an examination of the evidence, we think this finding correct, and will not disturb it.

It appears that the appellant built his fires at a time of the year when the land contained the very least moisture, and during a season that was especially dry. There was evidence tending to show that, during the month of September, while fires were burning upon his land, he frequently left home

leaving no one to guard them, or prevent them from spreading; that on the morning of the very day when the fire spread most rapidly, and actually damaged respondent's property, appellant endeavored to divert the waters from a small stream for the purpose of flooding the land and quenching the fire, but that he again left home without leaving any one in charge, or waiting to ascertain whether his efforts had been successful, and remained away until the damage was done. There is an abundance of other evidence to sustain all the findings made.

The only questions in this case calling for any serious consideration on this appeal being issues of fact, which the court properly determined in favor of respondent, the judgment will be affirmed.

MOUNT, C. J., DUNBAR, HADLEY, FULLERTON, and ROOT, JJ., concur.

[No. 6063. Decided April 11, 1906.]

JAMES SHEEHAN, *Appellant,* v. BAILEY BUILDING COMPANY, *Respondent.*[1]

APPEAL—NOTICE—STATEMENT OF FACTS—PARTIES. No notice of appeal or proposed statement of facts need be served upon a party who was voluntarily dismissed from the action by the appellant at the trial.

NEGLIGENCE — DANGEROUS PREMISES — ENTRANCE TO BASEMENT — FALL DOWN STAIRWAY. The owner of premises is not liable to a pedestrian on the sidewalk who falls down a stairway in attempting to escape from a runaway horse, where it appears that the stairway was in a private alley at the side of a building, protected on all sides except its entrance, which was over four feet from the line of the sidewalk and was a necessary or proper entrance to the basement of the building; since the owner is not required to guard against such an extraordinary accident.

[1]Reported in 85 Pac. 44.

Appeal from a judgment of the superior court for King county, Morris, J., entered June 10, 1905, upon granting a nonsuit, in an action for personal injuries sustained in falling down a stairway. Affirmed.

John Arthur, T. D. Page, and *Reavis, Thorp & Wheeler,* for appellant, cited: *Buesching v. St. Louis Gas Light Co.,* 73 Mo. 219, 39 Am. Rep. 503; *Graves v. Thomas,* 95 Ind. 361, 48 Am. Rep. 727; *Temperance Hall Ass'n v. Giles,* 33 N. J. L. 260; *Haughey v. Hart,* 62 Iowa 96, 17 N. W. 189, 49 Am. Rep. 138; *Murray v. McShane,* 52 Md. 217, 36 Am. Rep. 367; *Malloy v. Hibernia Sav. Bank* (Cal.), 21 Pac. 525; *Crogan v. Shiele,* 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88; *Norwich v. Breed,* 30 Conn. 535; *Bush v. Johnston,* 23 Pa. St. 209.

Peters & Powell, for respondent, cited: Beach, Contributory Negligence, p. 262; Ray, Negligence of Imposed Duty, p. 116; *Alline v. Le Mars,* 71 Iowa 654, 33 N. W. 160; *McLaury v. McGregor,* 54 Iowa 717, 7 N. W. 91; *Hardcastle v. South Yorkshire R. Co.,* 4 Hurlst. & Norm. 67; *Hounsell v. Smyth,* 7 C. B. N. S. 731; *Franklin v. Fisk,* 13 Allen 211, 90 Am. Dec. 194; *McIntire v. Roberts,* 149 Mass. 450, 22 N. E. 13, 14 Am. St. 432, 4 L. R. A. 519; *Fitzgerald v. Berlin,* 51 Wis. 81, 7 N. W. 836, 37 Am. Rep. 814; *Ely v. Des Moines,* 86 Iowa 55, 52 N. W. 475, 17 L. R. A. 124; *Lorenzo v. Wirth,* 170 Mass. 596, 49 N. E. 1010, 40 L. R. A. 347; *Kelley v. Columbus,* 41 Ohio St. 263; *Teater v. Seattle,* 10 Wash. 327, 38 Pac. 1006.

Root, J.—The respondent is the owner of a large brick and stone office building, situated on the west side of Second avenue, in the city of Seattle. Just south of this building, with a narrow private alley-way between, is the Butler block, a large brick and stone hotel building. In the basement of the Bailey building is a restaurant, which is reached from Second avenue by means of a stairway, about four feet, six

inches wide, and situated in the alley-way between said buildings. The top of this stairway is four feet and seven inches from the line of the front (east side) of said buildings, which line is the west side of the sidewalk. From the said west line of the sidewalk to the top of the stairway there is a gradual slope of about five or six inches, and the sidewalk, as well as the cement walk between it and the stairway, slopes slightly and gradually toward the south. The stairway leading to the basement is protected on the north and south sides by the walls of the two buildings mentioned, and on the west side by an iron or steel railing. It is open and unguarded only on the east side where it opens into the area of the alley-way leading to the street.

On the 14th day of April, 1904, appellant, while walking along the sidewalk in front of said Bailey building, had his attention attracted to a runaway horse coming along on the sidewalk and, in attempting to avoid being run over, he in some manner, the evidence does not show how, entered said alley-way and fell down the stairway hereinbefore referred to, sustaining severe injuries. The case was brought on for trial before the court and a jury. At the close of plaintiff's case, a challenge was interposed to the sufficiency of the evidence, and a motion for nonsuit made, both of which were sustained, and the action dismissed. From the judgment of dismissal, an appeal is taken.

The action was originally commenced against respondent and the city of Seattle, and both defendants appeared. Upon the day of the trial, the case was dismissed as to the city, upon the motion of this appellant. Respondent here moves to strike the statment of facts, and to dismiss the appeal, for the reason that neither the proposed statement of facts nor the notice of appeal was served upon the city. We do not believe the requirement of the statutes with reference to service of a proposed statement of facts and notice of appeal is applicable to a case where, as here, one of the defendants,

upon the motion of the plaintiff, is dismissed from the action prior to or during the trial. *McEachern v. Brackett,* 8 Wash. 652, 36 Pac. 690, 40 Am. St. 922; *Watson v. Sawyer,* 12 Wash. 35, 40 Pac. 413, 41 Pac. 43; *Smalley v. Laugenour,* 30 Wash. 307, 70 Pac. 786; *First National Bank v. Gordon Hardware Co.,* 30 Wash. 127, 70 Pac. 251. Both motions will be denied.

Upon the merits, it is claimed by appellant that the respondent, in keeping an open stairway so near a much-traveled street, was guilty of maintaining a nuisance, which was the proximate cause of the injury sustained by the appellant in falling, as hereinbefore stated. It is doubtless the law that the owner of premises adjoining a street shall not permit thereupon conditions calculated to occasion or permit injury to travelers using the street in the usual and ordinary manner; and such owner is liable for such injuries as are occasioned, by improper condition of his premises, to such travelers while making such usual and proper use of the street. But this record does not present a case of that kind. This stairway was used to reach the basement of the building where a legitimate business was being carried on, and to which it was proper that there should be access from the public street. The top of the stairs was four feet and seven inches away from the sidewalk. The open area between the head of the stairs and the sidewalk was not a public thoroughfare, but was a private way, furnishing access to those desiring to enter the basement of said building. That a pedestrian should stumble and fall from the sidewalk, or be hurled in any manner therefrom in such a way as to fall or be precipitated down said stairway, would be an accident or circumstance not to be anticipated as naturally or necessarily incident to the use of said sidewalk and street. In other words, it would be an unusual and extraordinary occurrence, such as could scarcely be expected to happen other than through the fault or negligence of the person so falling or precipitated, or of some third person or

agency. The owner of premises adjacent to a street is not required to anticipate or guard against such unusual and extraordinary occurrences. *Teater v. Seattle,* 10 Wash. 327, 38 Pac. 1006; *Lorenzo v. Wirth,* 170 Mass. 596, 49 N. E. 1010, 40 L. R. A. 347; *McIntire v. Roberts,* 149 Mass. 450, 22 N. E. 13, 14 Am. St. 432, 4 L. R. A. 519; Ray, Negligence of Imposed Duties, p. 116; *Alline v. City of Le Mars,* 71 Iowa 654, 33 N. W. 160.

We do not think the record in this case reveals any negligence on the part of the respondent. The judgment of the superior court is therefore affirmed.

MOUNT, C. J., DUNBAR, CROW, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 5980. Decided April 12, 1906.]

FRANCES E. LESTER, *Respondent,* v. THE CITY OF SEATTLE *et al., Appellants.*[1]

MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—CANCELLATION—JUDGMENT—RIGHT TO REASSESS. A judgment cancelling a void assessment is erroneous in enjoining the city from collecting anything further on account of the improvement, since it has the right to make a reassessment.

Appeal from a judgment of the superior court for King county, Frater, J., entered June 19, 1905, upon findings in favor of the plaintiff in an action to cancel a municipal assessment. Modified.

Scott Calhoun, for appellants.

C. M. Miller and *Byers & Byers,* for respondent.

PER CURIAM.—The main question argued on this appeal was determined adversely to the appellants by this court in the case of *State ex rel. Barber Asphalt Pav. Co. v. Seattle, ante*

[1]Reported in 85 Pac. 14.

p. 370, 85 Pac. 11. The judgment entered by the trial court, however, not only canceled the void assessment on the respondent's property and enjoined its collection, but it enjoined the city from "collecting or attempting to collect any further amount on account of said improvement." Since the city has the right to reassess the respondent's property for its due proportion of the cost of the improvement remaining unprovided for, that part of the judgment quoted is plainly erroneous, and the city should not be embarassed by it in its effort to make a reassessment. The judgment is reversed, and the cause remanded with instructions to modify the judgment in accordance with this opinion.

[No. 6011. Decided April 13, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES MAYO, *Appellant*.[1]

JURORS—CRIMINAL LAW—ACCUSED'S RIGHT TO DEMAND LIST. Bal. Code, § 6879, providing that an accused shall on demand be served with a list of the petit jurors returned, does not entitle him to be tried by a jury selected solely from the names so returned, nor to demand that such list be exhausted before a special venire be issued, where part of such jurors are in attendance upon another department of the court.

CRIMINAL LAW—DYING DECLARATIONS—KNOWLEDGE OF IMPENDING DEATH. A dying declaration is sufficiently shown to have been made in the realization of impending death where the doctor in attendance informed deceased that he was about to die, and the deceased stated that he realized it.

SAME—FAILURE TO IDENTIFY ACCUSED—ADMISSIBILITY. A dying declaration is not inadmissible because it failed to identify the accused, where it adds a link in the chain of evidence and made it possible to identify the person who committed the crime.

SAME—IMPEACHMENT—INCONSISTENT STATEMENTS—ADMISSIBILITY. A dying declaration may be impeached by showing other statements inconsistent therewith.

[1]Reported in 85 Pac. 251.

SAME—METHOD OF IMPEACHMENT. In a prosecution for homicide, it is error to require the defendant, in offering evidence of statements by the deceased which were inconsistent with his dying declaration, to introduce them after the manner of impeaching evidence; but he is entitled to ask the witness directly what statements were made by the deceased.

TRIAL—INSTRUCTIONS—WHEN REQUIRED IN WRITING. Under Laws 1903, p. 120, subd. 4, requiring the court, upon request, to instruct the jury in writing, unless the same is taken by the stenographic reporter, the employment of a private reporter who is not subject to the control of the court will not excuse the failure to instruct in writing.

CRIMINAL LAW—RIGHT TO APPEAR AND DEFEND—LIMITING ARGUMENT TO JURY—ABUSE OF DISCRETION. In a capital case in which twenty witnesses were examined and four days were consumed in the trial, it is an infringement of the constitutional right of the accused to appear and defend, and an abuse of discretion, to limit the time for argument to the jury to an hour and a half on each side.

CRIMINAL LAW—INSTRUCTIONS—PRESUMPTION OF INNOCENCE. In a criminal case it is the duty of the court to instruct the jury as to the presumption of the innocence of the accused.

SAME—DYING DECLARATIONS—INSTRUCTIONS. It is error to refuse to instruct that the dying declarations should be received with caution.

Appeal from a judgment of the superior court for Spokane county, Poindexter, J., entered July 10, 1905, upon a trial and conviction of the crime of murder in the second degree. Reversed.

Sullivan, Nuzum & Nuzum, for appellant.

R. M. Barnhart and *A. J. Laughon,* for respondent.

FULLERTON, J.—The appellant was informed against in the superior court of Spokane county for the crime of murder in the first degree, convicted of murder in the second degree, and sentenced to a term in the penitentiary. From the judgment of conviction he appeals.

He first contends that he was denied substantial rights given him by statute by the manner in which the jury was impaneled, and a number of his assignments of error are

based on rulings made by the court with reference thereto. These assignments, as they embrace but a common question, can best be considered together. The code (Bal. Code, § 6879) provides that any person indicted or informed against for a capital crime "shall, on demand upon the clerk by himself or counsel, have a list of the petit jurors returned delivered to him at least twenty-four hours before trial." Pursuant to this statute, some three days before the time set for the trial of his case, the appellant served upon the clerk a written demand for the list of jurors returned, and then in attendance upon the court. The clerk, in compliance therewith, certified and served upon him a list of all those serving on the regular panel, some fifty-three in number; also, a list of thirty-six more whom the court had ordered drawn from the jury list and directed to be summoned by special venire returnable on the morning fixed for the trial.

The superior court of Spokane county consists of three departments, all three of which were engaged in trying causes by jury at the time the appellant's case was called for trial. On the call of his case, some twenty-four of the jurors on the regular panel did not report for duty in the department in which the appellant was tried, being engaged in other departments, and the court, over his objection, ordered the trial to proceed without requiring them to be brought in; and also over objection directed that those summoned on the special venire, and who had reported for the first time that morning, be listed with the regular jurors. The impaneling of the jury was then commenced, and was proceeded with until the afternoon of the next day, when the judge presiding discovered that the jury could not be completed from the jurors then in attendance upon his department. He thereupon ordered twenty-four more names drawn from the jury list, and a special venire, returnable forthwith, issued for the jurors whose names were so drawn. Of these the sheriff summoned six, and their names were written on ballots, and placed in the clerk's box, over the objection of the appellant.

A juror who had been excused from attendance upon the court until that time also returned, and his name, over objection, was placed in the box. From this list, together with twelve of the regular panel, who had been brought in from another department, the jury before whom the appellant was tried was finally completed.

It is the appellant's contention that the statute above cited confers on a defendant accused of a capital crime the right, not only to have the list of jurors returned and in attendance upon the court served upon him twenty-four hours before his case is set for trial, but the right to have the jury before which he is tried selected from the list so served upon him; or, at least, to have that list exhausted in an effort to secure a jury before additional jurors are added to the list. The statute in question was enacted before Washington was admitted into the Union as a state, and at a time when the court system and the method of drawing and summoning jurors differed widely from the present court system, and the present method of drawing and summoning them. At that time we had a district court, which held terms at stated intervals fixed by law. Jurors were drawn in advance of these terms to report at the commencement thereof. If a sufficient number did not report to form a panel of the required number, the sheriff summoned from the by-standers, or the body of the county, a sufficient number of persons to make up the number. From this panel the trial juries required in the cases pending before the court were drawn. But since statehood, the changes from the old system have been radical, not only in the method of summoning trial jurors, but in the court system itself. Now there is in each county a superior court, which has no terms, and is open for business at all times except on non-judicial days. In some counties the court is composed of more than one department, for each of which there is a separate judge. These several departments have equal powers, and all may engage in trials by jury at the same time. Each department selects its trial jury from the same general panel. These

panels are drawn from lists prepared by the jury commissioners. On the second Saturday of each month, the court orders the commissioners to draw from the jury list the names of such number of persons as he thinks will be required for jury service during the ensuing month, and a venire is issued for the persons whose names are so drawn. The court is empowered, also, to order drawn and summoned by special venire, returnable at such time as it may direct, any additional number that the judge may think necessary from which to select a jury in any particular case. Nor does a single exercise of this power exhaust it. It may be resorted to until enough qualified jurors are so drawn. Moreover, this is the only way an exhausted panel may be now refilled in counties of the class to which Spokane belongs. It is no longer permissible to select from the by-standers, or issue an open venire to the sheriff. Whenever the general panel is exhausted, and additional jurors are required to complete a trial jury, they must be drawn from the jury list and a special venire issued for them, while under the old practice they were summoned from the by-standers by the sheriff.

From the foregoing, it is apparent that the section of the statute relied upon by the appellant, while harmonious and consistent with the statutes and general practice in vogue at the time it was enacted, has been rendered practically obsolete by the later statutes and practice. While a person charged with a capital offense may still demand, and may still have, a list of juros in service upon the court at the time his case is called for trial served upon him, yet it cannot be held that he has the right to have the jury which is to try his case selected exclusively from that list. Such a rule would make it impossible to try in one county two persons accused of capital crimes at the same time, no matter how many departments of the court there might be in that county. In fact, the rule would subordinate the business of the entire court to the demands of the particular case, and such we cannot hold to be the intention of the legislature. The later

statutes, in so far as they conflict with the earlier one, must be held to have superseded it; and consequently, we must hold that if it ever was the rule that a person charged with a capital crime had the right to have the jury before which he was to be tried selected from the panel in attendance upon the court at the time his case was called, the right has been taken away by the later statutes.

The information charged the appellant with having killed and murdered one William Crane by shooting him with a revolver. The state offered, and the court admitted in evidence, statements made by Crane after he had been wounded, and just prior to his death, concerning the circumstances of the shooting. These were admitted as dying declarations, and it is urged by the appellant that the court erred in so doing; first, because it was not made to appear that the declarant realized at the time they were made that he was about to die, or must die from the injuries he received; and second, because the description given of the person who did the shooting does not identify that person as being the defendant. As to the first objection, the evidence shows that the declarant had been informed by the doctor in attendance upon him that he was about to die, and that he stated that he realized it. This was sufficient to comply with the rule. *State v. Baldwin,* 15 Wash. 15, 45 Pac. 650.

The second objection is equally without merit. The admissibility of a dying declaration does not depend on its completeness. That it adds a link in the chain of evidence is all that is necessary. The declaration in this case did at least add a link to the chain of the evidence against the appellant. It described the circumstances under which the crime was committed, and made it possible to identify the person who committed the crime.

The appellant offered evidence tending to show that the deceased had made other statements, after receiving the wound from which he died, inconsistent with those contained in his

dying declaration. The court at first refused to admit the statements at all, but afterwards allowed the appellant to introduce them after the manner of impeaching evidence; that is to say, by permitting the appellant to ask the witness if the injured person did not, at a certain time and place, say so-and-so, concerning the manner in which he received the wound, instead of permitting the witness to be asked directly what the injured person said to him concerning that matter. That the dying declaration may be impeached by showing that the person making them made other statements inconsistent therewith is held by the great weight of authority. *People v. Lawrence,* 21 Cal. 368; *State v. Blackburn,* 80 N. C. 474; *McPherson v. State,* 9 Yerg. 279; *Hurd v. People,* 25 Mich. 405; *Battle v. State,* 74 Ga. 101; *Felder v. State,* 23 Tex. App. 477, 59 Am. Rep. 777; *Morelock v. State,* 90 Tenn. 528, 18 S. W. 258; *Green v. State,* 154 Ind. 655, 57 N. E. 637; *Carver v. United States,* 164 U. S. 694, 17 Sup. Ct. 228, 41 L. Ed. 602. The only cases to the contrary cited to us are, *Wroe v. State,* 20 Ohio St. 460, and *State v. Taylor,* 56 S. C. 360, 34 S. E. 939.

It will be observed on examination, however, that none of these cases touch the precise point made here. While they maintain or dispute the doctrine that a dying declaration may be impeached, the method of impeaching it is not touched upon. Treating the question as one of first impression we can see no reason for the restriction imposed by the court. In those jurisdictions which adhere most strictly to the rule that the inquiry made of the impeaching witness must embody the substance of the foundation question, and must be so framed as to admit of an affirmative or a negative answer, do so on the ground that otherwise hearsay evidence, not strictly contradictory, might be introduced to the injury of the parties and in violation of legal rules. But no such reason can have force in a case of this kind. Here there is no preliminary or foundation question; nor, from the nature of things, can there be any such question, and necessarily

the impeaching evidence must be brought in in the form of original evidence. The state, moreover, cannot be prejudiced by permitting the general question to be asked. If the evidence supports the dying declaration, the state's case is that much strengthened; on the other hand, if they are contradictory, the defendant is entitled to them under the general rule above cited. But perhaps the better reason for adopting the rule contended for is that the jury are more apt to get a correct understanding of the supposed contradictory statements when they are detailed by the witness who heard them than they are when recited in the form of a question put by counsel with its necessary wealth of *inuendo* and other explanatory matter. To arrive at the truth is the aim of all evidence, and the courts should follow the methods which best conserve that end. It seems to us that, in cases of this kind, that method would be to direct the attention of the witness to the matter desired to be introduced in evidence, and let him state in his own words what the deceased said concerning it.

At the conclusion of the evidence, the appellant requested the court to charge the jury in writing. The court did not comply therewith, and the appellant excepted thereto, and assigns the action of the court as error. The statute (Laws 1903, p. 120, subd. 4) provides that,

"When the evidence is concluded, either party may request the judge to charge the jury in writing, in which event no other charge or instruction shall be given, except the same be contained in the said written charge; . . . Provided . . . That whenever in the trial of any cause, a stenographic report of the evidence and the charge and instructions of the court is taken, the taking of such charge or instructions by the stenographic reporter, shall be considered as a charge or instruction in writing within the meaning of this section."

While the record is silent on the question, it is said by counsel that there were two stenographers present taking a stenographic report of the evidence, one employed on behalf of the prosecuting attorney, and the other by the defendant.

These presumably took a stenographic report of the court's charge as it was delivered, and the question is whether their presence relieved the court from this obligation to charge the jury in writing, when so requested. It is the appellant's contention that the stenographer present to relieve the court of this obligation must be an official stenographer, or at least one under the direction and control of the court, so that a copy of the charge could be had if application to the court should be made therefor. It seems to us that this objection is well taken. If the court may refuse to charge in writing when requested merely because one of the parties has employed a private stenographer to report the case on his behalf, then it may do so if it can discover that there is any person reporting the case, no matter for what purpose or on whose behalf. We think the stenographer referred to by the statute must be one who is under the direction of the court, and who can be required to furnish a copy of the instructions when a copy is requested. This is not true of a stenographer employed by one of the parties to the suit to report the case on his own behalf. Such a stenographer is not under the control of the court, nor is he under any obligation, nor can he be required, to furnish a copy of any part of the proceedings, either to the court or the opposing party. His duties are measured by his contract relations with the party who employed him. To say, therefore, merely because there is a stenographer present reporting the case, that the court need not charge in writing, when requested, is to practically annul the statute requiring the court, on request, to charge the jury in writing.

The court, against the objection, and over the exception, of the appellant, limited the time of argument to the jury to one and one-half hours on each side. It is contended here that this was such a manifest abuse of discretion on the part of the court as to entitle the appellant to a new trial. It seems to us that this contention is also well taken. To appear and defend in person and by counsel is a right

guaranteed to one accused of crime by the constitution of this state, as well as by the Federal constitution, and it is not to be denied that a part of that right is the right to address the jury on the questions of fact the issues present for determination. This right, too, has always been regarded as one of the greatest value, not only to the accused, but to the due administration of justice, and any limitation of it which has seemed to deprive the accused of a full and fair hearing has generally been held error entitling the defendant to a new trial. *Williams v. State,* 60 Ga. 367, 27 Am. Rep. 412; *Jones v. Commonwealth,* 87 Va. 63, 12 S. E. 226; *White v. People,* 90 Ill. 117, 32 Am. Rep. 12; *People v. Green,* 99 Cal. 564, 34 Pac. 231; *People v. Kennan,* 13 Cal. 581; *Dille v. State,* 34 Ohio St. 617, 32 Am. Rep. 395; *Hunt v. State,* 49 Ga. 255, 15 Am. Rep. 677; *State v. Rogoway* (Ore.), 81 Pac. 234; *State v. Tighe,* 27 Mont. 327, 71 Pac. 3.

In this case the trial consumed something more than four days. Over twenty witnesses were examined, and the evidence reported to this court makes a typewritten volume of nearly 500 pages. The case was a capital one. The killing was done by one of a foreign race, against which the preliminary examination of the jurors disclosed there existed in the public mind a considerable prejudice. Under these circumstances, we are clear that the limitation of one and one-half hours was too restrictive to allow a full and fair discussion of the facts of the case, and, hence, was a violation of the defendant's constitutional rights.

The appellant specially requested the court to instruct the jury on the law relating to the presumption of innocence. This the court refused to do, either in the language submitted with the request, or in its own language. This was error. The accused is entitled in every instance to an instruction on the presumption of his innocence. The court need not, of course, give the instruction in the language of the request unless it so desires; but when requested to instruct as to

the presumption of innocence, it should comply therewith in some form, such as will correctly inform the jury as to the law pertaining thereto. *Coffin v. United States,* 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; 12 Cyc. 621, and cases cited.

The appellant also requested the following instruction:

"Dying declarations are admissible from the necessities of the case, but they should be received with caution, for the reason that the declarant has not been administered an oath, and an opportunity for cross-examination has not been afforded the defendant, and that the declarant might be influenced against the defendant. And for the further reason that the physical condition of the declarant might render the statement more or less unreliable. Circumstances surrounding the declaration should be weighed the same as those surrounding other evidence."

This, or an instruction of similar import, should have been given. *State v. Eddon,* 8 Wash. 292, 36 Pac. 139.

The other instructions requested, and the exceptions taken to those given, require no special notice. In so far as the requests were pertinent, they were embodied in the general instructions given by the court, and no error was committed by the instructions given.

For the errors above set out, however, the case is reversed and a new trial granted.

MOUNT, C. J., HADLEY, DUNBAR, CROW, and ROOT, JJ., concur.

[No. 6027. Decided April 14, 1906.]

In the Matter of PIKE STREET, *Seattle.*[1]

MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—BENEFITS TO LAND NOT TAKEN—DUE PROCESS. After the assessment of damages by a jury for the condemnation of property for the purposes of widening a street, in which proceeding the jury finds that the remainder of the lands was not damaged by the improvement, such remainder is liable to an assessment if found to be specially benefited by the improvement, and such an assessment is not a taking of private property without due process of law.

SAME—ANSWER—STRIKING—HARMLESS ERROR. In a proceeding to condemn land for the purpose of a street, the striking of an answer alleging that the defendant's property would be damaged in a certain sum, is not prejudicial error, where the defendant was permitted at the trial to introduce his evidence of such damage.

SAME—ASSESSMENT OF DAMAGES TO PROPERTY NOT TAKEN—ISSUES DETERMINED. In a proceeding to condemn land for the purpose of a street, it is not error to exclude evidence as to the damages to defendant's remaining property, at the time of the consideration of the assessment roll, since that question should have been tried by the jury at the time of assessing the damages for the property taken.

SAME—CHARGING MUNICIPALITY WITH PORTION OF EXPENSE. Upon exceptions to the assessment of abutting property, for benefits from a local improvement, it is competent for the court to deduct a certain per cent of the assessment and charge the same against the general fund of the city, as a general benefit to the city from the improvement.

Appeal from a judgment of the superior court for King county, Morris, J., entered July 29, 1905, upon the assessment of benefits to property not taken, after an assessment by a jury of damages for property taken, in proceedings to appropriate lands for the widening of a street. Affirmed.

H. E. Foster, for appellant.

Scott Calhoun and *Elmer E. Todd,* for respondent.

FULLERTON, J.—In September 1903, the city of Seattle by ordinance directed that all that portion of Pike Street

[1]Reported in 85 Pac. 45.

lying between Fourth Avenue, on the west, and Melrose and Minor Avenues, on the east, be widened and altered by including therein a strip ten feet in width on each side, to be taken from the abutting property. The ordinance directed the corporation counsel to commence a proceeding to ascertain the just compensation to be paid the owners whose property would be taken by the proposed improvement, and also for the damages, if any, caused the property not taken. The ordinance also provided that the expense of the improvement should be paid by an assessment upon the property specially benefited.

The appellant, H. M. Peters, owned certain lots abutting upon Pike street, and by the terms of the ordinance ten feet off of the end of each of them was authorized to be taken for the use of the street. The corporation counsel began the proceedings, as directed, causing summons to be served upon the appellant as provided by law. The appellant appeared and filed an answer, in which he put in issue the allegations of the petition, and claimed that his property would be damaged by the proposed improvement to the amount of $60,000. On motion of the city, this answer was stricken by the court, on the ground that an answer was neither necessary nor proper in such a proceeding. Thereafter a trial was had before a jury on the allegations of the petition, the court deeming them denied by operation of law. In this trial the appellant appeared and participated, and was awarded damages by the verdict of the jury in the sum of $10,000 for the part taken; the jury finding, however, that the remainder of his property would not be damaged by the improvement.

Thereupon, pursuant to the statute, the city filed a supplemental petition praying for the appointment of commissioners to make an assessment of the property benefited for the purpose of paying the awards made to those whose property was to be taken and damaged. Commissioners were appointed, who made out and returned into court an assessment roll in which the remaining property of the appellant was assessed

as receiving benefits in the sum of $7,176. The appellant filed exceptions to the assessment, and after a hearing, the court modified the roll by deducting therefrom ten per centum of the amount assessed, directing that the amount so deducted be made a general charge against the city. The roll as modified was thereafter approved and confirmed, and the several amounts assessed against the several lots, the appellant's as well as the others, declared a first lien thereon. This appeal is from the order confirming the assessment.

The principal contention of the appellant is based upon the fact that the city, after taking a portion of his lots for the purpose of widening the street and awarding him compensation therefor, assessed the remainder for benefits accruing to them by reason of the improvement. This he says is taking his property without just compensation, and consequently without due process of law. But this precise question on a similar state of facts was before this court in *Quirk v. Seattle,* 38 Wash. 25, 80 Pac. 207, and we there held that the proceeding violated no provision of the constitution or laws of this state. This case is conclusive of the question, in so far as the state constitution and laws are concerned, and obviates the necessity of further discussing it. It is suggested, however, that the assessment violates the Federal constitution, but we think that the supreme court of the United States decided to the contrary in *Bauman v. Ross,* 167 U. S. 548, 17 Sup. Ct. 966, 42 L. Ed. 270. The discussion in that case is able and exhaustive, and we do not feel that any thing could be added to the reasoning by which the conclusion is reached.

As to the remaining assignments of error, it is complained that the court erred in striking out the answer filed to the original petition, and in refusing to hear evidence at the time the assessment roll was before the court for consideration to the effect that the buildings upon the appellant's lots were damaged by the widening of the street. But these exceptions are without merit on this appeal. The ruling of the

court with reference to the pleading, if error at all, was without prejudice, as the appellant was given opportunity to introduce evidence at the hearing concerning all of the matters alleged in his answer, and he could have had no further privilege had his answer been permitted to remain in the case. The refusal to admit the testimony offered was not error because that question was one of the questions necessary to be tried by the jury in assessing the damages to be awarded the appellant, and either was or should have been tried out at that hearing.

Finally it is contended that the assessment is illegal and voidable, because the court ordered ten per centum to be deducted from the amount originally assessed against the property, and made a charge against the general fund of the city. But we think there was no error in this. The statute gives the court power to modify, change, alter or annul the the assessment, and we think it may lawfully find that an improvement is of sufficient general benefit to make a proportion of the cost a general charge against the municipality. If, however, it be intended by the objection to assert that the assessment was confined to an arbitrary district which did not include all of the property specially benefited by the improvement, then the answer is that there is no evidence in the record that such is the case. In so far as we can discover by the record all of the property specially benefited by the improvement is included in the assessment roll, and the court will not presume the contrary merely because the city council fixed a district for assessment purposes prior to making the improvement.

The judgment appealed from is affirmed.

MOUNT, C. J., HADLEY, DUNBAR, ROOT. and CROW, JJ., concur.

[No. 5947. Decided April 14, 1906.]

THE LEWISTON WATER & POWER COMPANY, *Respondent*, v. E. S. BROWN *et al.*, *Appellants*.[1]

EJECTMENT—RECOVERY FOR BREACH OF CONDITION SUBSEQUENT—DEMAND BEFORE SUIT. In an action to recover the possession of premises for the breach of a condition subsequent, it is not necessary to make a demand or entry, in view of Bal. Code, § 5500, changing the common law rule in this respect.

DEEDS—CONDITION SUBSEQUENT—WAIVER—ESTOPPEL OF CORPORATION BY STATEMENTS OF ITS PRESIDENT. The provision in deeds of a corporation, the owner of a townsite, that in case of the sale of intoxicating liquors thereon, the premises should revert to the grantor, cannot be waived by the verbal statements of the president of the corporation, published as informal statements of the policy of the corporation, and such statements will not operate as an estoppel against the corporation.

APPEAL—REVIEW—HARMLESS ERROR. The admission of improper evidence is harmless in an action tried by the court without a jury.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered July 18, 1905, upon findings in favor of the plaintiff, in an action of ejectment tried before the court without a jury. Affirmed.

R. E. McFarland and *Graves & Graves*, for appellants.
Sturdevant & Bailey, for respondent.

FULLERTON, J.—The respondent, being the owner of a tract of land in Asotin county, in this state, platted the same into lots and blocks as a townsite, under the name of the Town of Lewiston; the name being afterwards changed by legislative enactment to Clarkston. These lots it put upon the market for sale, giving to the purchasers warranty deeds subject to a proviso in the following or similar language: "Provided, however, that in case the premises hereby conveyed should be used in any way for the purposes of any bar-room, saloon or brewery, that this instrument shall be-

[1]Reported in 85 Pac. 47.

come void and the title to said premises and water right shall at once revert to, and revest in, said grantor, or its assigns; this provision in no way relating to the manufacture of pure wine, syrups, etc., from the juices of the fruit." On October 30, 1897, the respondent conveyed, by deed containing the foregoing proviso, one of such lots to Frank Maruska, from whom it passed by regular mesne conveyances to the appellant E. S. Brown. Brown leased the same to the appellants Reed and Wilson, who fitted up a saloon thereon, and engaged in the sale of intoxicating liquors. This action was thereupon brought by the respondent, who prayed for a judgment and decree declaring the appellant's title forfeited, that it have restitution of the premises, and that its title to the same be quieted. A general demurrer was interposed to the complaint, and overruled; whereupon the appellants answered, setting up affirmative matter thought to estop the respondent from claiming a forfeiture. After a trial, which was had before the court without a jury, judgment was entered for the respondent in accordance with the prayer of its complaint, and this appeal was taken therefrom.

The appellants first contend that the respondent cannot maintain this action for the reason that it neither alleged nor proved that it entered upon the lot or made a demand for possession prior to its commencement. A number of cases are cited which sustain the contention, and such undoubtedly was the rule at common law. But we think the rule has been done away with in this state by statute. By section 5500 of the Code (Ballinger's), it is provided that any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper county, against the tenant in possession, or if there be no tenant in possession, then against the person claiming the title or claiming an interest therein. Neither demand or reentry is made a condition precedent to the right to maintain the action, and since this section was intended to supersede the common law

remedies for the recovery of real property, it must be held to contain in itself all of the limitations on the right to maintain such an action.

That this is the correct rule under the statute is abundantly sustained by authority. Thus, in *Austin v. Cambridgeport Parish,* 21 Pick. 215, it was said:

"To entitle the devisee to maintain this action, it would, by the principles of the common law, have been necessary for her to have made an actual entry before instituting her suit, but by the provisions of the Revised Statutes great and important changes have been introduced into our system in relation to real actions, both in the form of the pleading and in the proof necessary to sustain such an action. The demandant is no longer required to prove an actual entry under his title in those cases where such entry was necessary at common law, but if he shows that he is entitled to such an estate as he claims in the premises, whether as heir at law, devisee, or otherwise, and that he has a right of entry therein, this is sufficient proof of his seisin. Revised Stat. c. 101, Sec. 4, 8."

So, in *Cowell v. Springs Co.,* 100 U. S. 55, 25 L. Ed. 547, a case where this precise question was involved, it was said:

"We have no doubt that the condition in the deed to the defendant here is valid and not repugnant to the estate conveyed. It is a condition subsequent, and upon its breach the company had a right to treat the estate as having reverted to it, and bring ejectment for the premises. A previous entry upon the premises, or a demand for their possession, was not necessary. By statute in Colorado it is sufficient for the plaintiff in ejectment to show a right to the possession of the demanded premises at the commencement of the action as heir, devisee, purchaser, or otherwise. The commencement of the action there stands in lieu of entry and demand of possession."

And in *Cornelius v. Ivins,* 26 N. J. L. 376, it was said:

"As a general rule, it is not necessary to make an actual entry upon land in order to maintain the action of ejectment. The *right* to enter, not an *actual* entry, is requisite to sustain the action;" and that "as an actual entry on the

land is but a formal and unmeaning ceremony devoid of any practical meaning and unattended by any real advantage, there can be no utility in enforcing it, however strong the technical reasons in its support."

See, also, *Ruch v. Rock Island,* 97 U. S. 693, 24 L. Ed. 1101; *Atlantic etc. R. Co. v. Mingus,* 165 U. S. 413, 17 Sup. Ct. 348, 41 L. Ed. 770; *Ellis v. Kyger,* 90 Mo. 600, 3 S. W. 23; *Kirk v. Mattier,* 140 Mo. 23, 41 S. W. 252; *Sioux City etc. R. Co. v. Singer,* 49 Minn. 301, 51 N. W. 905, 32 Am. St. 554, 15 L. R. A. 751; *Plumb v. Tubbs,* 41 N. Y. 442.

The claim of estoppel is based on a statement made by the president of the respondent corporation. It appears that after the population of the town of Clarkston had reached a considerable number, the people began agitating the question of incorporation. The president of the respondent was in favor of that policy, and gave to one of the local papers a statement in the form of an interview in which he undertook to set forth the advantages that would accrue to them by an incorporation over their present condition. Among the statements made was the following:

"And how will the expense of police and fire protection be met? That answers itself. First, the city would have all the road taxes of some $1500 per year. A wise city government would require any party enjoying special privileges to pay a reasonable license for the same. These would include a dog license of, say $2 or $4 per year; a business license of $5 to $10 each per year, as in Lewiston, for example. And further, when the town is incorporated we propose to let the people themselves decide the saloon question. If the people shall vote to keep in Clarkston the money now spent for beer and other drinks in Lewiston and to have the drink money spent under local supervision and control, then the Lewiston Water & Power Company will not attempt to further control these matters. We prefer to have the people decide and control all local government and themselves, as is their undoubted right. In case they do permit one or two saloons under proper restrictions then the license money of say $500 for a saloon would greatly help to pay expenses."

It is this statement that is claimed to have estopped the corporation from insisting upon a forfeiture for a breach of the condition contained in the appellant's title deeds. But without attempting to follow in detail the argument of the appellants, we are clearly of the opinion that no estoppel can be predicated upon this statement. While conditions subsequent contained in deeds may be waived by parol, such waiver must be made by the grantor or his successor in interest. Where the grantor is a corporation, as it is in this case, controlled and managed by a board of directors, informal statements published in the papers by its president cannot be held to govern its policy, or waive solemn reservations in its deeds of conveyance.

"The president of a private corporation is, as the term implies, the presiding officer of its board of directors and of its shareholders when convened in general meeting. The office itself, however, confers no power to bind the corporation or control its property. The president's power as an agent must be sought in the organic law of the corporation, in a delegation of authority from it, directly or through its board of directors, formally expressed or implied from a habit or custom of doing business." 10 Cyc. 903.

It is further assigned that the court committed error in the admission of evidence, and in refusing to make certain findings of fact. Inasmuch, however, as the action was tried by the court without a jury the admission of improper evidence could not be prejudicial. Nor was there error in refusing to make the findings requested. In so far as they were supported by the evidence, they were immaterial, and on the main questions we are clear that the weight of the evidence is with the findings made.

No substantial error appearing in the record, the judgment appealed from will stand affirmed.

MOUNT, C. J., HADLEY, DUNBAR, ROOT, and CROW, JJ., concur.

[No. 5956. Decided April 16, 1906.]

LYDIA E. CHEZUM, *Appellant,* v. EDWIN A. CAMPBELL *et al.*, *Respondents.*[1]

FORCIBLE ENTRY AND DETAINER—WHO MAY MAINTAIN—OCCUPANTS—TENANT REFUSING TO PROSECUTE. Under Bal. Code, § 5526, subd. 2, giving the right to an "occupant" of land to maintain an action of forcible entry and detainer, a landlord cannot maintain the action against one who wrongfully enters upon lands occupied by a tenant, although the tenant refuses to prosecute and surrenders up his lease to the landlord (FULLERTON, J., dissenting).

Appeal from a judgment of the superior court for King county, Honorable Fenley Bryan, Judge *pro tempore,* entered March 18, 1905, upon findings in favor of the defendants, dismissing an action of forcible entry and detainer, after a trial before the court without a jury. Affirmed.

J. W. A. Nichols, for appellant.

Peters & Powell and *Marion Edwards,* for respondents.

CROW, J.—This is an action of forcible detainer. Upon trial without a jury, the court made findings of fact, from which it appears that the lands in question are fenced in two parcels, with a traveled road running north and south between them; that on the eastern parcel is a small frame house which, during all the times in the findings mentioned and until the commencement of this action, was vacant; that for the calendar years of 1902, 1903 and 1904, one James Markwell held a lease of said lands, from the appellant Lydia E. Chezum; that said Markwell at no time resided thereon, but that he exercised acts of dominion over said land by cutting hay in the summers of 1902 and 1903, and from time to time going thereon to repair fences; that in 1902 he permitted one Hyde to cultivate a garden on the eastern tract; that in 1903 he gave a like privilege to one Price; that on

[1]Reported in 85 Pac. 48.

May 7, 1904, the respondent John Smart, while said Markwell was in the occupancy of said lands under his lease, and during his temporary absence therefrom, entered upon and began to plow said lands, under an agreement with the respondent Edwin A. Campbell to cultivate the same on shares; that such entry was made without fraud, intimidation, stealth, violence, or any circumstance of terror, and without the knowledge or consent of the appellant Lydia E. Chezum; that, before said entry by Smart, he told Markwell of his intention to shortly begin plowing the land under his arrangement with Campbell, to which Markwell replied that he (Smart) would get into trouble if he did so; that, at the time Smart entered and began plowing, Markwell was about one hundred yards away, but not on the land; that he saw Smart drive upon the land and begin plowing, but made no remonstrance or effort to prevent him from so doing; that he did not afterwards endeavor to regain possession, nor did he make any demand on Smart, or any of the respondents, for possession; that on May 12, 1904, said Markwell voluntarily, and in writing, surrendered his leasehold interest to the appellant Lydia E. Chezum, who on May 20, 1904, made due demand upon the respondents for the surrender of said lands to her, which demand has never been complied with. Upon these findings, conclusions of law were made favorable to respondents, and a final judgment of dismissal was entered, from which this appeal has been taken.

The appellant contends that the conclusions of law and judgment were not warranted by said findings, to which she took no exception. She insists that the findings made require the entry of a judgment in her favor. It will be observed that, at the time appellant's tenant Markwell was dispossessed by the respondent Smart, he (Markwell) was not only entitled to, but was in possession of, the land; also, that his lease from the appellant was not voluntarily sur-

rendered for several days thereafter. This being an action for forcible detainer under Bal. Code, § 5526, subd. 2, appellant's right to recover depends upon the meaning of the word "occupant," as used in said subdivision. The trial court held that it meant only the person in actual possession or occupation. In other words, that in this case it meant the tenant Markwell, and not his landlord, the appellant. Appellant contends that this is too narrow a construction; that the term "occupant" is not limited to one who is in actual personal possession, but also includes one in constructive possession, which she says any owner of land has when there is no actual adverse possession. She further insists that the possession of her tenant is her possession to such an extent as to constitute her an "occupant" in contemplation of the statute. We think the trial court properly construed said section, and that appellant's contention cannot be sustained.

Forcible detainer, as defined in Bal. Code, § 5526, subd. 2, involves, (1) an entry during the absence of the occupant; (2) a demand for surrender by the party dispossessed; and (3) a refusal for three days to surrender to the former occupant. The findings show that an entry was made by Smart during the absence of appellant's tenant, Markwell, who was thus deprived of his previous peaceable possession; but they show that Markwell never afterwards made any demand of Smart for a surrender, and that Smart therefore never refused to surrender possession to the former "occupant," who is identified by the statute as the "one who, for five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property." We do not think this description can be applied to appellant, who, at the time of the entry by Smart, was the lessor of Markwell, her tenant. An occupant is defined by Webster as "one who occupies, or takes possession; one who has the actual use or possession, or is in possession, of a thing." Bouvier, in his Law Dictionary, defines occupant as "one who has the actual

use or possession of a thing." Shumaker & Longsdorf, in their Law Dictionary, in defining "occupant," say: "One who has the actual use or possession of a thing. Occupancy implies the exclusion of every one else from enjoyment. Tenant in possession." See, also, *People v. Ambrecht,* 11 Abb. Pr. 97; *Redfield v. Utica etc. R. Co.,* 25 Barb. 54; *Lechler v. Chapin,* 12 Nev. 65.

Appellant was not an "occupant," as defined in said § 5526, subd. 2, nor was she in the peaceable and undisturbed possession of the real property, as contemplated by said section. As suggested by respondents in their brief, peaceable and undisturbed possession means actual and immediate possession, such possession as a man has of the house in which he lives, or the field he tills, or the land whereon he pastures his cattle. It is not essential that there be a continuous personal presence on the land, but there must be exercised at least some actual physical control, with the intent and apparent purpose of asserting dominion. The words "peaceable" and "undisturbed," when applied to such possession, convey a clear meaning. The true intent of the statute by these words and by the five-day limitation is to exclude a momentary or scrambling actual possession; not to describe a constructive possession.

"An action of forcible entry and detainer is strictly possessory in its nature, and, unless otherwise expressly provided by statute, a person who has never been in possession of land cannot maintain the action to obtain possession. If he has any interest in the land, he must seek to establish it in some other form of action. Generally speaking plaintiff in order to maintain this form of action must allege and prove that he was in peaceful and exclusive possession of the premises in controversy, and that he has been forcibly ousted or that possession was peaceably obtained and forcibly withheld by defendant." 19 Cyc. 1128.

In *Gore v. Altice,* 33 Wash. 335, 74 Pac. 556, this court, in commenting upon the action of forcible detainer, said:

"The forcible entry and detainer law has always been recognized, ever since its enactment, as a law in the interest of peace, or to prevent violations of the peace and acts of violence in contentions over the possession of real property. It is a provision for a speedy determination, not of any title to the real estate, or of the right of possession, but of the question of who was in actual possession, and if such actual possession was disturbed; and the only question is, was the occupant in the actual and peaceable possession of the property at the time the possession was wrested from him? The statute provides that the occupant of real property, within the meaning of the law, is one who, for five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property."

By reason of the fact that the appellant was the landlord, and that her tenant Markwell was in possession, and that she therefore was not the occupant of the land, she was not entitled to prosecute this action, not being the real party in interest.

"When the premises in question are occupied by a tenant, such tenant must bring this action if the premises are forcibly entered upon or detained by third persons. The landlord cannot bring the action; and even though the term of the tenant has expired and he has left the premises, the landlord cannot maintain a forcible entry and detainer, if the entry complained of was made during the tenant's term." 13 Am. & Eng. Ency. Law (2d ed.), 752.

In *Treat v. Stuart,* 5 Cal. 113, the supreme court of California said:

"The plaintiff in an action of forcible entry and unlawful detainer, must show an actual peaceable possession in himself at the time of the entry. A landlord cannot sue in this form in his own name for an unlawful entry upon the possession of his tenant. The remedy is a summary one given by statute to protect the possession and cannot be extended by implication to any others than the real occupants."

In *McKeen v. Nelms.* 9 Ala. 507, the first syllabus reads as follows:

"A landlord who becomes entitled to the possession of premises by the determination of a lease under an arrangement with his tenant, cannot maintain a proceeding for a forcible entry and detainer for an entry made while the tenant was in possession."

In this case it was shown that, in December, 1893, one Carlos Reece went into possession of the premises as lessee of the plaintiff McKeen; that, while he was in possession as such lessee, the defendant Nelms wrongfully dispossessed him. The tenant Reece thereafter surrendered his lease to his landlord, and received back certain notes which he had given for rent. Under the facts shown it further appeared that the tenancy of Reece had not been entirely terminated at the time the defendant seized possession, although he had then conceived the purpose of surrendering the premises to his landlord, and had even commenced to remove his goods. The court held that he was the actual occupant of the land and continued to be such until he yielded up the possession by removing himself, his family and all his goods from the premises. After stating these facts the court, in the body of the opinion, says:

"The facts shown at the trial do not warrant the inference that the tenancy of Reece had ceased at the time the defendant's goods were deposited in the house; such a conclusion is even repelled by the testimony. The tenant, it is true, had conceived the purpose to give up the premises to his landlord, and thus put an end to the lease. He had even began to remove his effects, but the house was still occupied by him—his family and part of his movables were there; and this was quite sufficient to make him the actual occupant until he yielded up the possession by removing himself, family and his property from the premises. There is nothing in the terms of the lease, which reinvested the plaintiff with the possession, upon the determination of the tenant to abandon it, or the removal of a part of his goods in furtherance of his intention. And there is no principle of law which will authorize us, to give to a possession subsequently acquired a retrospective effect, so as to permit the occupant to maintain a complaint for a previous forcible entry. It

results from this view, that the plaintiffs did not show such a state of facts as entitled them to recover in the present proceeding (See 2 Overt. Rep. 233; 3 Dana's Rep. 586)."

In *Emsley v. Bennett,* 37 Iowa 15, the supreme court of Iowa said:

"The facts of actual possession by the plaintiff, and an entry by force, fraud or stealth, or an unlawful detainer by the defendant are the only ones to be determined—and they alone are the matters in issue irrespective of the ownership or right of possession. It is immaterial, also, in what capacity or relation the plaintiff is in possession, whether as owner, tenant, agent, or as a mere trespasser. It is the *fact* of possession alone that is material."

In *Hudgen v. Temple,* 12 B. Mon. (Ky.) 198, the supreme court of Kentucky said:

"If Temple [the defendant] entered after the 2d of October, and before the 25th of December, 1849, it was upon the possession in fact, of the tenants of the plaintiff, whose term had not expired, and who alone could maintain this proceeding for such forcible entry. So, likewise, if Temple entered after the expiration of the term of the said tenants, but whilst they still continued upon the plaintiff's land, and before they delivered back the possession to the plaintiff, it would still be but a forcible entry upon them or upon their actual possession, and they alone, and not the plaintiff, in such case, could maintain this proceeding for a forcible entry. Although the tenants by holding over their term, are guilty of a forcible *detainer* of the possession from their landlord, and might by this proceeding, at his instance, be compelled to restore the possession to him, yet a forcible entry in the meantime, upon the premises in the actual possession of the tenants, though after the expiration of their term, is a forcible entry upon them and not upon the landlord, who has not yet regained the possession in fact from his tenants."

In *Hyde v. Fraher,* 25 Mo. App. 414, the syllabus reads as follows:

"In an action of forcible entry and detainer, the question is not, who is entitled to the *possession* of the premises; the

object of the action is, to *restore* things to the state *in which they were* before the forcible entry was made. The *gist* of the action is the forcible entry, and the *object is restitution* to the one dispossessed. If a landlord, after the expiration of a lease, *forcibly* enters upon premises still in the possession of his tenant, the latter can maintain an action of forcible entry and detainer against the former. *Held,* that the landlord, in this case, cannot maintain an action of forcible entry and detainer for the dispossession of his tenant during the term of his lease, after the expiration thereof. Where a tenant is turned out of possession, he alone, and not the landlord, can maintain an action of forcible entry and detainer."

See, also, *Hammel v. Zebelein,* 51 Cal. 532; *Polack v. Shafer,* 46 Cal. 270; *Barlow v. Burns,* 40 Cal. 351; *Conroy v. Duane,* 45 Cal. 597; *Dills v. Justice,* 9 S. W. (Ky.) 290.

When Smart wrongfully dispossessed the appellant's tenant, Markwell, the right of Markwell to an action of forcible detainer was in no way dependent upon the further fact that he (Markwell) was the appellant's tenant. His right of action arose for the reason that for five days preceding the act of Smart he had been in the peaceable and undisturbed possession of the property. He could have maintained an action against Smart irrespective of the question as to whether he himself had during such five days been entitled to possession. His cause of action did not accrue by reason of his right to possession, but from the mere fact that he, having theretofore enjoyed an actual, peaceable possession for five days, was wrongfully dispossessed by Smart. If he had been holding possession wrongfully as against appellant, that fact would not have deprived him of his cause of action against Smart, nor would it have conferred any right of action upon appellant to proceed against Smart. The statute was not enacted for the purpose of either trying title or the right to possession, but for the sole purpose of protecting one's peaceable and undisturbed possession against any other party who, by taking the law into his own hands, might wrest such possession from him. For the reasons above

stated, we think the appellant was not entitled to prosecute this action.

The judgment is affirmed.

MOUNT, C. J., DUNBAR, and HADLEY, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to agree with the conclusion reached in the foregoing opinion. In my judgment it takes too narrow a view of the statutes of forcible entry and detainer. Those statutes were intended as much to operate against one who wrongfully intrudes upon lands, as they were to furnish a summary remedy in favor of one whose possession has been intruded upon. The purposes of all such statutes are beneficial in their nature; they are intended to prevent the forcible or deceitful and tricky entry upon lands held by a doubtful title; tending thereby to preserve the peace and prevent fraud and injustice, by compelling one who asserts the right to possession to show in the courts a better right than the one who has possession. Such statutes ought, therefore, to receive a liberal construction so as to promote the objects for which they were enacted; and hence, when it is made to appear, as it was in this case, that a tenant holding land under lease refuses to prosecute under the statutes one who wrongfully enters upon and wrongfully detains the leased land, and surrenders his right to so prosecute to his landlord, the landlord ought to be permitted to exercise that right.

[No. 5922. Decided April 18, 1906.]

WHITE PINE LUMBER COMPANY, LIMITED, *Appellant*, v. AETNA INDEMNITY COMPANY, *Respondent*.[1]

BONDS—INJUNCTIONS—ACTION UPON—PREVENTING CUTTING OF TIMBER—RIGHT TO CUT—NONSUIT. In an action upon an injunction bond for damages sustained by reason of an order temporarily restraining the cutting of timber on certain lands, a nonsuit is properly granted, where the complaint alleged that the plaintiff was engaged in cutting timber as it lawfully might do, and where it was denied that the plaintiff had any right so to do, and no evidence was offered of any right in the plaintiff to cut such timber.

SAME—ATTORNEY'S FEES—COSTS—WHEN NOT COVERED BY BOND. In an action upon an injunction bond, given upon show cause orders temporarily restraining the cutting of timber, the plaintiff cannot recover for the fees of attorneys employed in the matter, where their efforts were directed against the issuance of an injunction *pendente lite*, and no motion was made to dissolve the temporary orders; nor could the usual costs of the action be recovered as an expense growing out of the orders and covered by the bond.

Appeal from a judgment of the superior court for Spokane county, Morris, J., entered June 13, 1904, upon granting a nonsuit, in an action upon injunction bonds. Affirmed.

O. C. Moore, for appellant.

P. C. Shine and *W. L. Husbands*, for respondent.

ROOT, J.—On the 6th of June, 1903, in an action then pending in the superior court in Spokane county, wherein one Howard Gumaer and wife were plaintiffs, and this appellant was defendant, a temporary restraining order was issued, enjoining appellant from cutting or removing timber from certain lands described in the complaint therein. Said restraining order directed this appellant to appear before said superior court on the 23d day of June, 1903, to show cause why an injunction *pendente lite* should not be issued by the court. On said return day, appellant appeared by

[1]Reported in 85 Pac. 52

counsel, and the application for the injunction *pendente lite* was denied, and the proceedings quashed, it appearing that service had not been made upon any authorized officer or person. Thereupon said Gumaer and wife applied for, and secured, the issuance of a second restraining order, similar to that previously issued, and requiring this appellant to appear before said court on the first day of July, 1903, to show cause why an injunction *pendente lite* should not be issued. Upon the return day appellant appeared and demurred to the complaint in the action, which demurrer was subsequently by the court sustained, and the action dismissed.

Each of the two restraining orders provided that said Gumaer and wife should give a bond before said orders should be effective. They gave, in each instance, such a bond, with this respondent as surety thereupon. The present action is to recover against respondent upon said bonds, for damages alleged to have been suffered by reason of the issuance of said restraining orders, said alleged damages consisting of attorney's fees, court costs and losses arising from enforced idleness of teams, men, machinery, etc., during the time said restraining orders were in force. The cause came on for trial before a court and a jury. At the close of plaintiff's case, the defendant challenged the sufficiency of the evidence, and moved for a judgment dismissing plaintiff's action, which challenge and motion were sustained by the court. From the judgment thus entered, this appeal is taken.

Appellant's complaint in this action contained the following allegation: "That on the 6th day of June, 1903, and for some time prior thereto, this plaintiff had been engaged, as it lawfully might, in cutting and removing timber from lots 5 and 6, of section 27, in township 56, north of range 5, west of the Boise Meridian." Respondent expressly denied that appellant was at said time, or any time, lawfully engaged in cutting and removing timber from said lands, or that it could be lawfully engaged in so doing. Appellant

offered no evidence whatever to establish this allegation of its right to cut and remove said timber. It appears from certain things occurring in the course of the trial that the timber and land in question were claimed by said Gumaer and wife. It was the opinion of the trial court that any interference with teams, men, machinery, etc., employed in cutting this timber would not constitute damages for which it could recover as against this bond, unless some right of appellant was interfered with. If the company had no right to cut this timber or go upon these premises, it could not be said to have been damaged by being prevented from so doing. We think this position is tenable, and must be sustained.

Appellant urges that it is entitled to recover attorney's fees expended in having the restraining orders dissolved. The record, however, fails to show that any such services were rendered. No motion was made to dissolve either of the restraining orders. On the return day of each, appellant by counsel appeared and resisted the application for the granting of an injunction *pendente lite;* and upon the first occasion the proceeding was quashed for the reason that there had been no service, and upon the second return day a demurrer was sustained to the complaint and the action dismissed. The result in each case was to terminate the restraining order; but in each case said order became *functus officio.* The restraining order was effective merely to the time of the hearing. It would then be superseded by the injunction *pendente lite,* if the court saw fit to grant such. No motion to dissolve was directed against either of the restraining orders, and no order was made dissolving either. Consequently it cannot be said that any attorney's fees were occasioned on account of said orders. Attorneys were employed to resist the applications for the injunctions *pendente lite,* and to have the proceedings quashed and the action defeated. The expense incurred in employing attorneys for such purposes would not be a charge against the sureties upon

the bonds given to render the restraining orders effective. *Donahue v. Johnson,* 9 Wash. 187, 37 Pac. 322; *Thompson v. Benson,* 41 Wash. 70, 82 Pac. 1040.

As to the court costs, what has already been said would in a measure apply to the question of their allowance. When the defendant appeared, he was required to pay the usual appearance fee of $2. The restraining orders had nothing to do with this expense, which was one that would be occasioned by the bringing of any action regardless of the suing out of restraining orders.

Finding no error in the record, the judgment of the lower court is affirmed.

MOUNT, C. J., CROW, DUNBAR, HADLEY, FULLERTON, and RUDKIN, JJ., concur.

[No. 6019. Decided April 19, 1906.]

ROY & ROY, *Appellant,* v. NORTHERN PACIFIC RAILWAY COMPANY, *Respondent.*[1]

CARRIERS—BILL OF LADING—AUTHORITY OF AGENT TO ISSUE. The agent of a railway company has no authority to issue a bill of lading for goods to be transported unless the goods have been actually received, even as to an innocent transferee of the bill of lading.

SAME—NEGOTIABILITY. Bal. Code, § 3598, makes bills of lading negotiable for the purpose of transferring the title to the goods actually represented thereby, but not in the sense that bills and notes are negotiable and proof against defenses in the hands of *bona fide* purchasers.

SAME—ESTOPPEL TO DISPUTE AUTHORITY. A railway company is not estopped to dispute the authority of its agents to issue bills of lading without the actual receipt of any goods for transportation, and a purchaser without knowledge of the facts respecting the agent's authority takes a bill of lading at his own risk.

SAME — DEFENSES — FRAUDULENT ISSUE. Where no goods have actually been received for shipment, the carrier may show that a bill of lading has been fraudulently or erroneously issued, as a defense against liability to a *bona fide* purchaser or holder.

[1]Reported in 85 Pac. 53.

SAME—PLEADING—ANSWER. It is not necessary to plead a defense to liability upon a bill of lading when all the facts constituting the defense appear on the face of the complaint.

Appeal from a judgment of the superior court for King county, Morris, J., entered June 23, 1905, upon sustaining a demurrer to the complaint in an action upon a bill of lading. Affirmed.

Wright & Kelleher, for appellant.

Carroll B. Graves, for respondent.

CROW, J.—This action was instituted by the appellant, Roy & Roy,a corporation, against respondent, Northern Pacific Railway Company, a corporation, upon two certain bills of lading claimed to have been issued by said respondent for two carloads of shingles. The complaint contains two causes of action, but as the questions raised thereby are identical, we will state the first cause only. The complaint, for the first cause of action, alleges, that on November 23, 1903, the respondent, through its agent at Ravensdale, Washington, issued and delivered to one W. J. Doucett a certain bill of lading, acknowledging the receipt of 231¼ M. 16 5x2 clear shingles, shipped from Covington, Washington, on said date, to Eaton Prairie, Minnesota, billed from the Allen Shingle Company to Roy & Roy, the appellant; that in truth said respondent had not received from said Allen Shingle Company, or said Doucett, or any other person, said shingles, or any shingles, at the time of the issuance of said bill of lading, and that there were no shingles loaded on the car named therein; that said Doucett was not the agent of the said Allen Shingle Company, had no authority to bill or ship any shingles for said company, was not the owner or in control of any shingles for said company, all of which facts were at the time well known to respondent, or could have been learned by the most casual inquiry; that on November 21, 1903, said Doucett presented said bill of lading to the appellant Roy & Roy, who, relying upon the representations therein contained, and

believing respondent had said shingles in its possession, paid to said Doucett the sum of $326.34, the value of said shingles; that by reason of the negligence of the respondent in issuing said bill of lading to said Doucett, he was enabled to defraud appellant out of said sum of $326.34; that said Doucett is wholly insolvent, and that prior to the commencement of this action appellant demanded that respondent repay the said sum of $326.34, or deliver said shingles to it, which the said respondent refused to do. To each cause of action of the complaint, the respondent interposed a general demurrer, which being sustained, the appellant refused to plead further. Thereupon judgment was entered dismissing the action, and this appeal has been taken.

The principal question to be determined on this appeal is whether the respondent railway company is liable to appellant for the value of said shingles. The appellant has affirmatively pleaded that no shingles were ever received by respondent, thus showing the false and fraudulent character of the recitals contained in the bill of lading. But as it was issued by one H. S. McIntyre, respondent's agent at Ravensdale, who was authorized to issue bills of lading for merchandise actually received for shipment, appellant contends that the respondent is estopped from relying upon the defense that it received no shingles, not only because it held out McIntyre, its agent, as having full authority to issue such bill of lading, but for the further reason that said bill of lading as executed is negotiable and transferable by indorsement and delivery, under the laws of this state and the usages and customs of merchants and shippers generally, and that appellant, relying upon said bill of lading and on the truth of its recitals, and believing the shingles had been actually delivered to respondent, paid to said Doucett the value of said shingles, and thereby became an innocent purchaser for value.

Appellant, in support of its contention, has cited numerous authorities, including *Sioux City etc. R. Co. v. First Nat. Bank,* 10 Neb. 556, 35 Am. Rep. 488; *Brooke v. New York*

etc. R. Co., 108 Pa. St. 529, 56 Am. Rep. 235; *Armour v. Michigan etc. R. Co.,* 65 N. Y. 111, 22 Am. Rep. 603; *Dickerson v. Seelye,* 12 Barb. 99; *Wichita Sav. Bank v. Atchison etc. R. Co.,* 20 Kan. 519; *Watson v. Memphis etc. R. Co.,* 9 Heisk (Tenn.) 255; *Bank of Batavia v. New York etc. R. Co.,* 106 N. Y. 195, 60 Am. Rep. 440; *St. Louis etc. R. Co. v. Larned,* 103 Ill. 293; *Smith v. Missouri Pac. R. Co.,* 74 Mo. App. 48. These cases are cited here upon the theory that, as the agent McIntyre was employed by respondent to receive goods for shipment, and to issue bills of lading therefor, and as he as such agent actually issued the bill of lading in question, containing a recital of the receipt of the shingles, as between respondent and appellant, an innocent third party, who has acted in good faith while relying upon said recital, the respondent should be estopped from denying the truth of its statements, and from making the defense that the shingles had not been actually received. It is true that the authorities above cited sustain appellant's position, still we find that the English courts, the supreme court of the United States, the Federal courts generally, and many of the state courts have, in numerous well considered cases, announced an entirely opposite doctrine, which we will now announce as the law of this state. Where a transportation company shows that merchandise was not actually received by it, and that a bill of lading has been issued by its agent, either through fraud or mistake, the supreme court of the United States, since followed by other courts, has held that, as the receipt of the goods lies at the foundation of the contract to carry and deliver, there can be no such contract unless the goods have actually been received, and that an agent of the carrier has no authority to issue a bill of lading without actual receipt of the goods, and cannot bind the carrier, even as to an innocent transferee or pledgee of the bill of lading. 6 Cyc. 419; *Grant v. Norway,* 10 C. B. 665; *Jessel v. Bath,* L. R. 2 Ex. 267, 36 L. J. Ex. 149; *Meyer v. Dresser,* 16 C. B. (N. S.) 646; *Brown v. Powell Coal Co.,* L. R. 10 C. P.

562; *Cox, Patterson & Co. v. Bruce & Co.*, 18 Q. B. D. 147; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998; *Friedlander v. Texas etc. R. Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Lazard v. Merchants' etc. Transp. Co.*, 78 Md. 1, 26 Atl. 897; *The Loon*, 7 Blatch. 244; *Robinson, McLeod & Co. v. Memphis etc. R. Co.*, 9 Fed. 129, and 16 Fed. 167; *Martin v. Railway Co.*, 55 Ark. 510; *Sears v. Wingate*, 3 Allen 103; *Hunt v. Mississippi Cent. R. Co.*, 29 La. Ann. 446; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380; *National Bank of Commerce v. Chicago etc. R. Co.*, 44 Minn. 224, 46 N. W. 342, 560, 20 Am. St. 566, 9 L. R. A. 263; *Black v. Wilmington etc. R. Co.*, 92 N. C. 42, 43 Am. Rep. 450; *Hazard v. Illinois etc. R. Co.*, 67 Miss. 32, 7 South. 280; *Dean v. King*, 22 Ohio St. 118.

The appellant, however, not only relies upon the doctrine of estoppel, but also contends that the bill of lading was negotiable and that it, as an innocent purchaser for value, should be protected, citing *First Nat. Bank v. Northern Pac. R. Co.*, 28 Wash. 439, 68 Pac. 965. While our statute, Bal. Code, § 3598, makes a bill of lading negotiable by indorsement for certain purposes, it is not negotiable in the same sense as promissory notes, bills of exchange or other commercial paper. In *First Nat. Bank v. Northern Pac. R. Co., supra,* we only held that a carrier issuing a bill of lading is bound to make delivery of the goods represented thereby to the holder thereof. In other words, that the assignment of the bill of lading confers upon the assignee such title to the goods as may have been held by the party to whom the bill of lading was originally issued. In *Yarwood v. Happy,* 18 Wash. 246, 51 Pac. 461, we, in substance, held that our statute was only declaratory of the previous common law rule concerning bills of lading, and should not be construed as making an indorsement effective for any purpose other than to transfer the property represented, citing with approval *Shaw v. Railroad Co.*, 101 U. S. 557, 25 L. Ed. 892, in which the supreme court of the United States said:

"Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes."

The negotiable character of a bill of lading is discussed in *Pollard v. Vinton, supra,* where Justice Miller says:

"A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense. It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgement of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

In *Lazard v. Merchants' etc. Transp. Co., supra,* the court of appeals of Maryland said:

"No principle is better settled by the commercial law, than that neither the master of the ship nor the agent of a transportation company has the right to sign bills of lading, until they have been actually put on board of the ship, or delivered into the possession of the company. And if a master or agent signs a bill of lading for goods which have not been delivered to the carrier, the owner of the ship, or other means of transportation is not liable either to the shipper, or to one dealing with or making advances in good faith upon the bill of lading. It is hardly necessary to say that bills of lading are not by the commercial law negotiable in the same sense as bills of exchange and promissory notes. They are merely the evidence of ownership, general or special of the property mentioned in them, and the right to receive said property at the place of delivery; and one making advances of money upon them does so at his own risk, and with notice of the limitation as to the power or rights of the master or agent to sign the same."

In *The Carlos F. Roses,* 177 U. S. 655, 20 Sup. Ct. 803, 44 L. Ed. 929, Chief Justice Fuller said:

"Bills of lading stand as the substitute and representative of the goods described therein, and while *quasi* negotiable instruments, are not negotiable in the full sense in which that term is applied to bills and notes. The transfer of the bill passes to the transferee the transferror's title to the goods described, and the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it."

See, also, *Friedlander v. Texas etc. R. Co.,* 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991; *Anderson v. Portland Flouring Mills Co.,* 37 Ore. 483, 60 Pac. 839, 82 Am. St. 771, 50 L. R. A. 235.

We cannot adopt the doctrine of estoppel as contended for by the appellant. Respondent's agent only had authority

to issue bills of lading for goods actually received for transportation, but had no authority to issue any such bills for goods not received. The railroad company was not a broker dealing in bills of lading, but was only engaged in the business of transporting goods and merchandise. This fact was well known to the shipping public. Those who dealt with the respondent knew that its business was that of transportation only. When a bill of lading issued by it is assigned to a third party who purchases the same or makes advances thereon, such third party is presumed to have knowledge of these conditions. One who purchases a bill of lading does it at his own risk, and must know that the company will be permitted to show that the goods were never received by it, if such be the fact. If, therefore, a transportation company is able to show that a certain bill of lading has been fraudulently or erroneously issued, no goods having been actually received for shipment, such showing will constitute a complete defense against any liability upon its part to a *bona fide* purchaser or holder. It was not necessary for respondent to plead such defense in this case, as all the essential facts appear upon the face of the complaint. In *Friedlander v. Texas etc. R. Co., supra,* Chief Justice Fuller says:

"It has been frequently held by this court that the master of a vessel has no authority to sign a bill of lading for goods not actually put on board the vessel, and, if he does so, his act does not bind the owner of the ship even in favor of an innocent purchaser. *The Freeman v. Buckingham,* 18 How. 182, 191; *The Lady Franklin,* 8 Wall. 325; *Pollard v. Vinton,* 105 U. S. 7. And this agrees with the rule laid down by the English courts. *Lickbarrow v. Mason,* 2 T. R. 77; *Grant v. Norway,* 10 C. B. 665; *Cox v. Bruce,* 18 Q. B. D. 147. 'The receipt of the goods,' said Mr. Justice Miller, in *Pollard v. Vinton, supra,* 'lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.' 'And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land, as well as carriers by sea,' as was said by Mr. Justice

Matthews in *Iron Mountain Railway v. Knight,* 122 U. S. 79, 87, he adding also: 'If Potter (the agent) had never delivered to the plaintiff in error any cotton at all to make good the 525 bales called for by the bills of lading, it is clear that the plaintiff in error would not be liable for the deficiency. This is well established by the cases of *The Schooner Freeman v. Buckingham,* 18 How. 182, and *Pollard v. Vinton,* 105 U. S. 7.'

"It is a familiar principle of law that where one of two innocent parties must suffer by the fraud of another, the loss should fall upon him who enabled such third person to commit the fraud; but nothing that the railroad company did or omitted to do can be properly said to have enabled Lahnstein to impose upon Friedlander & Co. The company not only did not authorize Easton to sign fictitious bills of lading, but it did not assume authority itself to issue such documents except upon the delivery of the merchandise. Easton was not the company's agent in the transaction, for there was nothing upon which the agency could act. Railroad companies are not dealers in bills of exchange, nor in bills of lading; they are carriers only, and held to rigid responsibility as such."

While there is some conflict on the question of the respondent's liability in the decisions of the various state courts, we find no such conflict in the decisions of the Federal courts, which uniformly hold respondent not liable. We not only think the current of authority sustains the position assumed by the respondent here, but also feel that in announcing our opinion we should act in harmony with the Federal courts. This was the view taken by the supreme court of Minnesota in the case of *National Bank of Commerce v. Chicago etc. R. Co., supra,* where it said:

"But on questions of commercial law it is eminently desirable that there be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted. Moreover, on questions of general commercial law the Federal courts refuse to follow the decisions of the state courts, and determine the law according to their own views of what it is. It is therefore very desirable that on such questions the state courts should conform

to the doctrine of the Federal courts. The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the Federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the Federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens."

We think the complaint failed to state a cause of action, and that the trial court committed no error in sustaining the demurrer. The judgment is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, ROOT, and DUNBAR, JJ., concur.

[No. 5817. Decided April 28, 1906.]

JACOB C. MANN, *Appellant*, v. THE PROVIDENT LIFE AND TRUST COMPANY *et al.*, *Respondents*.[1]

APPEAL AND ERROR — FINDINGS — EXCEPTIONS — TIME FOR FILING. Where findings were filed without service upon the opposite party, written exceptions thereto, filed within five days after notice of the findings, are in time, and the exceptions and statement of facts will not be struck out.

MORTGAGES—REDEMPTION—EXTENSION OF PERIOD—INDEFINITE TIME —DELAY. Upon an agreement to extend the time for redeeming from a mortgage foreclosure, without any definite time being fixed, offer to redeem must be made in a reasonable time, and five and one-half years is not a reasonable time where valuable improvements have been made and the property has increased in value (ROOT and DUNBAR, JJ., dissenting).

MORTGAGES — REDEMPTION — AGREEMENT FOR EXTENSION — PAROL PROOF. Where the written agreement entered into pending the foreclosure of a mortgage makes no mention of any extension of the right of redemption, clear and satisfactory evidence must be produced of any parol agreement to that effect.

[1]Reported in 85 Pac. 56.

MORTGAGES—CONTRACT FOR REDEMPTION—ADDITIONAL SECURITY—CONSIDERATION — CONSTRUCTION — EXTENSION OF PERIOD. Where a mortgagor, to secure further time, had placed certain valentine scrip with the mortgagee as further security, an agreement pending foreclosure of the mortgage to sell the scrip to the mortgagee at a nominal consideration in return for an agreement to allow a redemption of both the real and personal property, is based upon a valid consideration, inasmuch as there is no right to redeem the scrip upon an execution sale; and the two instruments, one to sell the scrip and the other to resell the same in case the real estate shall be previously redeemed, should be construed to effectuate such a contract, and not as an indefinite extension of the time to redeem both the real and personal property (ROOT and DUNBAR, JJ., dissenting).

ACTIONS — PREMATURELY COMMENCED — OBJECTION WHEN TO BE RAISED. The objection that a foreclosure suit was prematurely commenced, cannot be first raised in a collateral action to obtain an equitable redemption pursuant to an alleged agreement extending the time therefor.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 15, 1905, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enforce an equitable redemption of property sold on mortgage foreclosure. Affirmed.

Allyn & Allyn and *F. Campbell,* for appellant.

E. R. York, for respondents.

CROW, J.—On June 20, 1892, appellant obtained a loan of $50,000 from the respondent The Provident Life and Trust Company, and to secure the same, gave a mortgage on certain real estate in the city of Tacoma. The interest on said note for the years 1894 to 1897, inclusive, was not paid when due. In 1894, appellant, being unable to meet the taxes, interest and insurance, had a conversation with Henry Longstreth, the western agent of said mortgagee, pursuant to which appellant deposited with him Valentine scrip sufficient to locate one hundred and sixty acres of land. Appellant claims that this scrip was given to secure a year's

extension upon the note and mortgage. Respondent denies this, but it is an admitted fact that the time was extended, in that no effort was made to foreclose or otherwise enforce payment during the succeeding year. In 1895 another transaction of the same kind took place, the appellant again depositing Valentine scrip. On January 17, 1898, appellant deposited with respondent more scrip, being all that he owned, which, together with that already deposited, was sufficient to locate six hundred and sixty-four acres. Appellant claims that, when this last deposit was made, the respondents agreed to extend the time upon said note and mortgage for another year. This is disputed by respondents.

On June 27, 1898, respondent company began a foreclosure suit on the note and mortgage. Appellant defaulted, and on September 12, 1898, a judgment was entered in the sum of $84,035.95. A day or two after the entry of the foreclosure decree, the appellant called upon respondent Longstreth for the purpose of making a sale of his interest in the Valentine scrip already deposited, and securing to himself the right to redeem. When first on the witness stand he gave his version of this interview with Longstreth, but upon being recalled afterwards explained his former statements, testifying as follows:

"I said to Mr. Longstreth two days before the contract was made when I called on him, 'Let me sell you the scrip for a nominal sum, giving me your contract to sell it back to me for a nominal sum, bidding the whole amount on the property, keeping it together, giving me time to redeem it.' Now, I don't know how I answered that question, but that is how I should have answered it."

Mr. Longstreth asked a day or two to think the matter over. Appellant called on him again, on September 15, 1898, at which time the following written instruments, drawn by Mr. Longstreth, were signed and delivered:

"Received Tacoma, Wash., Sept. 15, 1898, of Henry Longstreth one dollar in full payment for all my right, title and interest in eighteen pieces of Valentine scrip, as follows:

Nos. E57, E169, E214, E222, E224, E289, E291, E275, E300, E244, E273, E290, E124, E241, E274, E271, E114, and E111. (Signed) Jacob C. Mann."

"Tacoma, Sept. 15, 1898. For value received I hereby agree to transfer all my right, title and interest in certificates of Valentine scrip Nos. E57, E169, E214, E222, E224, E289, E291, E275, E300, E244, E273, E290, E124, E241, E274, E271, E114 and E111, being eighteen pieces in all, to Jacob C. Mann on payment of one dollar, provided lots one (1), two (2), seven (7), eight (8), nine (9) and ten (10) in block nine hundred and three (903), Tacoma, have been previously redeemed from the lien of the mortgage which we are foreclosing. Witness A. L. Andrews. (Signed) Henry Longstreth."

On October 15, 1898, the mortgaged real estate was sold under a special execution, and was purchased by the respondent company for the full amount of the judgment and costs, to wit: $84,970.35. This sale was confirmed on November 23, 1898. Respondent company as purchaser entered into possession of said real estate on said 15th day of October, 1898, without objection on the part of appellant. Such possession has been maintained by it or its successors ever since, and permanent improvements to the value of $170,000, in the shape of a six-story and basement brick store and office building, were made upon said real estate during the year 1903 by respondent, or by one David G. Alsop, who, it is claimed, was a successor in interest to the respondent company.

In April, 1904, appellant asked respondents for an accounting, and in September, 1904, made and served upon them a written demand that he be permitted to redeem both said scrip and the above described lots, that respondents furnish the appellant a statement of the amount necessary to make said redemption, and that respondents account for the rents collected. Respondents refused to comply with any of said demands. The lots involved herein were, at the time of the sheriff's sale, of the probable value of $60,000. The scrip

was then of the probable value of $15,000. Appellant began this action on September 12, 1904, as a proceeding in equity to compel respondents to make an accounting, and for permission to redeem the real estate and scrip upon ascertaining the amount due over and above the rents and profits collected by respondents.

The trial judge made findings of fact and conclusions of law favorable to respondents. One of said conclusions recites that, "No extension or agreement for extension, beyond the statutory period, of a right to redemption of the real property involved herein before the mortgage foreclosure sale was made by the defendants to plaintiffs." And another of said conclusions is as follows: "That plaintiff has failed to establish any right to equitable relief herein." And another recites that the defendants are entitled to a judgment and decree "that plaintiff recover nothing in this cause." A judgment and decree were accordingly made and entered, from which this appeal is taken.

Respondents have moved this court to strike the exceptions to the findings of fact upon the ground that said exceptions were not filed within five days from the time said findings were filed. A motion to strike the statement of facts is also made on the same ground. From the affidavits of appellant's attorney on file herein, which affidavits are undisputed, it appears that the findings of fact were signed by the trial judge, and filed at a time when appellant and his attorneys were not in court, and that the same were not served until after the five days had expired; that appellant's attorneys prepared and submitted to the trial judge and filed their exceptions to said findings within five days from the time the same were called to their attention and served upon them. Under these circumstances the motion to strike the exceptions and statement of facts must be denied.

It will be noticed that, in the bill of sale made by appellant to Longstreth, no consideration is mentioned excepting the nominal one of one dollar, and that in the agreement to resell,

made at the same time by Longstreth, the same consideration was mentioned, with the proviso that, as a condition precedent to redemption of the scrip, the mortgaged lots should have been previously redeemed from the lien of the mortgage then being foreclosed. Appellant claims that he made this bill of sale in consideration of an understanding and agreement with Longstreth that the period of redemption should be extended for a reasonable time beyond the statutory period of one year, and that he should now be permitted to pay up and redeem both the real estate and the scrip. This contention is disputed by respondents, who claim that the consideration for the bill of sale was the agreement of Longstreth, as agent of the trust company, to bid the full amount of the judgment for the real estate at the sale thereof, and to hold the scrip without selling it until the statutory period of one year for redeeming had expired, and permit it to be redeemed with the real estate, as one transaction, within the statutory period. The trial court, in part, made findings as follows:

"That plaintiff was at said various times unable to pay said moneys then due, and desired to secure further time for payment of same and to delay suit on said note and mortgage, and plaintiff at various times prior to, and on January 17, 1898, assigned, transferred and delivered to Henry Longstreth, as agent of said company, certain certificates of Valentine scrip, to be held as further and additional security for the payment of said note and mortgage, and in consideration thereof said company from time to time delayed suit on said note and mortgage.

"That thereafter, on October 15, 1898, the mortgaged property above described was duly sold by the sheriff of said Pierce county, under writ of special execution issued upon said judgment and decree, and said mortgaged property was bid in and purchased by said company at said sale for the sum of $84,970.35, being the full amount of said judgment and costs; and thereafter on November 23, 1898, said sale was duly confirmed by order of said court entered in said cause.

"That on September 15, 1898, after the entry of said judg-

ment and decree, said Jacob C. Mann sold and, by an instrument in writing bearing said date, transferred absolutely to Henry Longstreth all of said certificates of Valentine scrip which had been theretofore pledged as additional security to said mortgage debt, and in consideration thereof said Henry Longstreth, by an instrument in writing bearing same date, agreed to re-transfer all of said certificates of Valentine scrip to said Jacob C. Mann provided the real property described in said mortgage had been previously redeemed from the lien of said mortgage; but no agreement was made by or between the plaintiff and defendants or either of them to extend the time for the redemption of said real property from said mortgage debt beyond the statutory period, or for any time or at all."

We think these findings fully warranted by the evidence. If, however, appellant's contention that he gave the bill of sale in order to get an extension of time to redeem be accepted as correct, still the limit of that extension was not agreed upon, and such alleged extension would necessarily be held to have been for a reasonable period only. The question would then be presented as to whether appellant sought to redeem within a reasonable period. In determining this question, we would have to take into consideration the character of the indebtedness and of the property, and all the circumstances surrounding it and the parties. Upon so doing, we could not hold that appellant commenced this action to redeem within a reasonable time. He waited five and a half years before making any demand for an accounting, or indicating any intention to redeem, and he did not commence this action for an accounting and for permission to redeem until nearly six years after the sale of the property. In the meantime real estate had greatly increased in value, and respondents, relying upon the absolute title claimed by them, had in good faith expended $170,000 for permanent improvements. Were we to accept appellant's contention as to there being an extension of the time to redeem, even then the facts shown by the evidence would not be sufficient to entitle him

to redeem or to have an accounting as demanded in his complaint.

After making a careful examination of all the evidence, we fail to see how the trial court could have found any contract for an extension of the period of redemption for either a certain or an indefinite time. The written instruments above quoted fail to state any such agreement, and the appellant has failed to produce any clear or convincing evidence showing it to have been made by parol. While a right of redemption or an extension thereof may be founded on a parol agreement, and is not within the statute of frauds, still it should never be enforced unless clearly and satisfactorily proven. *Clark v. Renaker,* 14 Ky. Law 465, 20 S. W. 534.

"Where the period for redemption is either created or extended by contract, the owner of the land or other redemptioner must comply with the terms of the contract or lose his right to redeem. If the time for redemption is not fixed and certain, the right must be asserted within a reasonable time, or it will be considered waived." *Turpie v. Lowe,* 158 Ind. 314, 62 N. E. 484, 92 Am. St. 310.

It cannot be successfully contended that the appellant has asserted his alleged right within a reasonable time, yet the only theory upon which he can possibly recover in this action is that, by the terms of the receipt and contract of sale above set forth, and the terms of some further simultaneous parol agreement claimed to have been made between himself and Longstreth, he was given a reasonable extension of time running beyond the statutory period, within which to redeem not only the real estate but also the Valentine scrip. We think this theory cannot be sustained, and that it was rightfully rejected by the trial court, there being no evidence to show any such oral agreement. The written instruments alone cannot be intelligently construed as conferring any such rights upon appellant. We have above quoted a portion of his testimony, given after he returned to the witness stand, and was per-

mitted to explain. Prior to that time on cross-examination he had testified in part as follows:

"Q. You had no contract with Mr. Longstreth or with his company with regard to the redemption of this property other than shown in this agreement there, dated September 15th? A. No, sir. Q. That is the only agreement in regard to it? A. Yes, sir."

On re-examination, conducted by his own attorney, he testified as follows:

"Q. Now, you were asked, Mr. Mann, whether you had any other agreement with Mr. Longstreth than this plaintiff's Ex. C, dated September 15th, 1898, in relation to the extension of time. A. Nothing. Q. That is, you mean you had no other written agreement? A. I had no other agreement. Q. Had no other agreement? A. None whatever. Q. When you say you had no other agreement, Mr. Mann, this contract, which you received here and this bill of sale which you made, was made by him and you in conformity to the request that you had made two days prior to that? A. Yes. Q. That was part of the same contract, wasn't it? A. Yes, sir. Q. There was a consideration for the making of this contract? A. Well, they explain themselves. Q. They do? A. Yes. Q. Isn't it a fact that you stated that there was no other agreement than that written agreement? A. Sure, I so stated."

From this evidence, given by appellant himself, it appears that the only agreement between the parties was contained in the two written instruments. We are, therefore, now called upon to determine his rights by construing these instruments in the light of the surrounding circumstances and facts which are not questioned. There is no dispute that prior to the commencement of the foreclosure action, all of the Valentine scrip had been assigned to the respondent company as collateral security. At the time of the foreclosure sale, the real estate as shown by the evidence, was not worth more than $60,000. Although appellant placed a very high valuation upon the Valentine scrip, based upon prices which he had paid for it in the years 1888-9, when he and many

others erroneously supposed it could be used for securing title to tide lands, the undisputed evidence shows that, at the time of the sheriff's sale in 1898, it could not have been worth, at the highest estimate, more than $15,000. From this it follows that the combined market value of the real estate and scrip which the respondent company held as security at the date of its judgment and sale did not exceed $75,000, while its judgment was entered for more than $84,000. Appellant must have known that the respondent could issue an execution upon its foreclosure judgment and decree and first sell the real estate, even at its full value, for less than the face of its judgment, and could thereafter issue an alias execution upon its deficiency judgment and sell the Valentine scrip. After an execution sale of the Valentine scrip, which was personal property, there would have been no right of redemption whatever as to such scrip. If, however, appellant could succeed in effecting an arrangement with the respondents, by which they would make their entire bid for the real estate, and would also give him the privilege of redeeming the scrip within the statutory period of one year on condition that he also redeemed the real estate, he might thereby be enabled to recover back not only the real estate, but also the scrip, in the event of finding himself able to redeem within the statutory period, which he hoped to do and evidently anticipated that he might do. With this object in view, nothing would be more natural than for the parties to enter into just such an agreement as the one evidenced by the written receipt and bill of sale. Had the appellant then redeemed the real estate within the statutory period, he would also have been entitled to a return of the Valentine scrip not otherwise redeemable. This opportunity to recover the Valentine scrip in the event of redemption of the real estate was a right not guaranteed him by any existing statute, and constitutes a valuable consideration for his agreement to sell the scrip. Having failed to redeem the

real estate within the statutory period, he not only lost all interest in the real estate, but also in the scrip.

It seems to be conceded, and is a fact disclosed by the evidence, that at the time of the foreclosure and sale, a period of intense financial distress, causing a marked depression in property values, prevailed in this country. Although there is some evidence tending to show that during this period it was customary for the respondent company to bid the full amount of its judgments at its foreclosure sales, we would not be justified in assuming that, in the absence of the above written agreements, it would have done so in this case, where it not only held the real estate but also the scrip as security, and where their combined market value was considerably less than the face of its judgment. On the contrary, the most natural and business-like course for it to have adopted under existing conditions would have been to first bid in the real estate for a portion of its claim, and the scrip for the remainder, thus protecting itself as much as possible by acquiring title to all the property, both real and personal, which it held as security. The evident intention of the parties was not to extend the period of redemption indefinitely, but to relieve the respondent company from the necessity of proceeding in this manner for its protection, and at the same time to enable it to concede to appellant the right to redeem both the real estate and the scrip within one year, on the basis of the price bid for the real estate at the sheriff's sale. Any other theory would compel us to assume that the respondent company would, in the absence of any agreement, have necessarily bid the full amount of its judgment for the real estate alone, being $24,000 more than its market value, and by thus fully satisfying its judgment, place itself in a position where it would be compelled to release the scrip.

There is some contention made by appellant to the effect that the foreclosure suit was prematurely commenced. That question should have been raised and adjudicated in that cause. It cannot be considered in this collateral proceed-

ing. It is also contended by the appellant that he was not properly served with summons in the foreclosure suit. We have carefully examined the record of the foreclosure action, which is before us, and are of the opinion that a valid personal service was made upon him.

We find no error in the record, and the judgment of the superior court is affirmed.

MOUNT, C. J., HADLEY, FULLERTON, and RUDKIN, JJ., concur.

ROOT, J. (dissenting)—I am unable to fully agree with the conclusion reached by the majority of the court. I think that appellant is entitled to relief in the matter of the Valentine scrip. This scrip was placed with respondents as additional security. Appellant was obliged to put it up as such collateral in order to prevent the foreclosure of the mortgage upon his real estate. He at length placed the last that he had of this scrip. According to the evidence, with the last scrip he had furnished the respondents with all the property he had in the world as security for this indebtedness; and he contends that the last deposit made was upon the understanding and agreement that the mortgage should not be foreclosed within a year from that time. Respondents claim that there was no such agreement and understanding. We think the condition and surrounding of the parties lend strong corroboration to the contention of the appellant in this particular. But respondent company begins this suit about five months after this last deposit of scrip was made, instead of waiting twelve months. After the decree of foreclosure had been entered, the bill of sale from appellant and the agreement to resell by Longstreth were executed. The oral testimony as to the purchase and consideration of this transaction is flatly contradictory—appellant giving his version and Longstreth giving that of himself and the company. Their oral negotiations having terminated in the written bill of sale and written agreement for resale, it follows that these documents must constitute the

best evidence of the intention of the parties. By an examination of said written agreement to resell, we find that it opens with the recital "for value received, I hereby agree to transfer . . . on payment of $1.00; provided lots one [and the other mortgaged real estate] have been previously redeemed of the lien of the mortgage which we are foreclosing." An examination of the 6th finding of fact made by the trial court shows that the court found that appellant made the bill of sale of the Valentine scrip "and in consideration thereof said Henry Longstreth, by an instrument in writing bearing same date agreed to retransfer all of said certificate of Valentine scrip to said Jacob C. Mann provided the real property described in said mortgage had been previously redeemed from the lien of said mortgage;" but also found that no agreement of extension of the time for redeeming the real estate was made. Looking at these written instruments and the finding of the trial court (which respondents are not in a position to question) we are unable to see any valid or valuable consideration for the bill of sale of this scrip made by appellant to Longstreth. The latter merely agreed to resell the scrip upon the doing by appellant of a certain act which would have entitled him to a return of this scrip regardless of any agreement. The value of this scrip is and was uncertain. It was shown to have cost appellant something over $100 per acre, and was at one time probably of the value of $150 per acre. At the time of the trial it was probably worth at least $20 an acre, and perhaps much more. Appellant claims that, at the time of the first deposit made, it was accepted by the respondent upon the basis of $100 per acre. Appellant claims that this scrip was worth $75,000 at the time of these deposits while respondents claim that it was not worth more than from $12,000 to $15,000. In view of the situation of these parties, having in mind the advantage which respondents had over appellant, I am not disposed to

draw the lines closely against him. As the trust company, respondent, insists upon a strict compliance with its legal rights in the premises, it cannot complain if appellant is given the benefit of the same measure of construction. If the consideration for the bill of sale of this scrip and of the contract for resale was as contended for by respondents, it should have been expressed in those instruments. Instead of that, we find something entirely different. These two instruments constitute one transaction; and the purpose and intention of the parties thereto must be gathered from the written language employed in the light of surrounding undisputed circumstances. Courts, and especially courts of equity, should not apply a rigid rule of construction in favor of one party and against the other under like conditions. Neither should the rigor of the law be visited with severity upon the helpless debtor and palliated in favor of the creditor in a case where, at best, the debtor suffers great hardship while the creditor reaps a rich and abundant harvest in addition to the recovery of its loan, interest and costs.

Viewing the transaction regarding this bill of sale and contract for resale with the critical eye of the law or by the comprehensive vision of equity, I cannot find justification for the retention of this scrip by respondents. I think substantial justice would be done as between these parties if appellant receive the Valentine scrip which he deposited.

DUNBAR, J., concurs with ROOT, J.

[No. 5984. Decided April 28, 1906.]

BESSIE OLIVE HILLMAN, *Appellant,* v. CLARENCE D. HILLMAN *et al., Appellants, and* S. H. STEELE *et al., Respondents.*[1]

DIVORCE—SETTLEMENT BY PARTIES—ATTORNEY'S FEES—NO RIGHT IN ATTORNEYS TO INTERVENE. Where a wife settles with her husband her action for a divorce, her attorneys cannot intervene in the suit and obtain judgment for their fees and costs advanced; Bal. Code, § 5722, requiring the husband to pay the reasonable expenses of the wife therein not applying; and it being the policy of the law not to discourage such settlements.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 26, 1905, upon findings in favor of interveners, upon the voluntary dismissal of an action for divorce. Reversed.

Fred'k R. Burch, for appellants.

Blaine, Tucker & Hyland, and *Wm. Hickman Moore,* for respondents.

FULLERTON, J.—The appellants Bessie Olive Hillman and Clarence D. Hillman are husband and wife, and the appellant Homer L. Hillman is the brother and business partner of Clarence D. Hillman. The respondents Steele & Brown are attorneys at law. On March 21, 1904, the appellant Bessie Olive Hillman began an action for divorce, and for a partition of the community property, against her husband, joining her husband's brother as a party defendant because of the business relations existing between him and her husband. The respondents Steele and Brown appeared as attorneys for Mrs. Hillman. A preliminary restraining order was applied for and issued, and an application made for temporary alimony and suit money, including attorney's fees. Pending this latter application, the Hillmans condoned their differ-

[1]Reported in 85 Pac. 61.

ences, and a stipulation was entered into for a dismissal of the action. This stipulation was signed by Mrs. Hillman, but not by her attorneys, and when presented to the court was opposed by them, on the ground that they had an interest in the action to the extent of their attorney's fees, and that the parties were without power to dismiss the action without their consent. The court took this view of the case, allowed the attorneys to file a petition in intervention for their fees and costs they had advanced, and ordered a hearing thereon, at the conclusion of which it entered a judgment against the appellants, Bessie Olive Hillman and Clarence D. Hillman, in favor of the attorneys, for one thousand dollars as attorney's fees, and nine dollars they had advanced as costs, together with the costs of the proceedings.

The warrant for this judgment is thought to be found in § 5722 of the Code (Ballinger's) which provides that the court in an action for divorce brought by the wife may "require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the action, when such divorce is granted or refused, and give judgment therefor." But this section contemplates a judgment in favor of the wife, one running in her name, and is not authority for the intervention in the suit by the wife's attorneys, and the entry of a judgment against the husband and wife in their favor. The measure and mode of compensation of attorneys and counsellors are, under our statute, a matter for private agreement between client and attorney (Bal. Code, § 5165) and controversies between them over such fees have no place in actions where the relation of attorney and client exists. Claims for attorney's fees, where adjusted by actions, must be in actions brought for their adjustment, as claims of all other kinds are adjusted. True, the code in all cases makes an allowance for attorney's fees called costs, and in certain classes of cases makes allowances for attorney's fees as such. But these do not belong to the attorney by mere operation of law, nor

is he entitled to judgment for them; they are awarded to the prevailing party, and judgment for them is entered in the name of such party.

There are cases which maintain the doctrine contended for by the respondents, but we think they are not founded in the better reason. It is the policy of the law to encourage husband and wife to compromise and settle between themselves their domestic troubles, and to discourage actions for divorce. Actions for divorce, therefore, which both parties desire dismissed, should not be kept alive merely to settle the claims of counsel for attorney's fees. Cases supporting the conclusion we have reached are the following: *Reynolds v. Reynolds,* 67 Cal. 176, 7 Pac. 480; *Sims v. Davis,* 48 Neb. 720, 67 N. W. 765; *Strover v. Strover,* 7 Idaho 185, 61 Pac. 462; *Thompson v. Thompson,* 40 Tenn. 526; *McCulloch v. Murphy,* 45 Ill. 256.

The judgment appealed from is reversed and the cause remanded with instructions to dismiss the action.

MOUNT, C. J., HADLEY, DUNBAR, RUDKIN, and CROW, JJ., concur.

[No. 5338. Decided April 28, 1906.]

HERBERT L. WILLIAMS, *Respondent,* v. SPOKANE FALLS & NORTHERN RAILWAY COMPANY, *Appellant.*[1]

DAMAGES—VALUE OF SERVICES—EVIDENCE—ADMISSIBILITY. In an action for damages for personal injuries sustained by a mail clerk, whose employment and promotion depends upon fixed civil service rules, it is competent to show the salaries to which he would be entitled upon promotion, upon the issue as to his earning capacity.

WITNESSES—PHYSICIANS—PRIVILEGED COMMUNICATIONS. A patient waives the privilege attached to the statements of his physician when he permits him to testify without objection.

SAME — CROSS-EXAMINATION. Upon the cross-examination of a physician as to the disability sustained by his patient, a wide lati-

[1]Reported in 84 Pac. 1129.

tude is allowed on cross-examination for the purpose of discrediting his testimony, and the same will be reviewed only for abuse of discretion.

DAMAGES—DEFENSES—CLAIM OF SIMULATION—ATTEMPTS AT SETTLEMENT IN REBUTTAL. In an action for personal injuries in which the defense claims that the plaintiff was not much injured, but was simulating "hysterical paralysis," evidence on the part of the plaintiff of repeated visits by the defendant's claim agent, in an endeavor to secure a settlement, is admissible in rebuttal.

DAMAGES—EXCESSIVE VERDICT—PARTIAL PARALYSIS. A verdict for $33,000 damages for injuries sustained by a mail clerk, a young man, resulting in partial paralysis, is excessive, and should be reduced to $20,000 (DUNBAR, J., dissenting).

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered May 27, 1904, upon the verdict of a jury for $33,000 damages for personal injuries. Affirmed on condition of remitting $13,000.

M. J. Gordon and *C. A. Murray*, for appellant.

Graves & Graves, for respondent.

ON REHEARING.

MOUNT, C. J.—On May 22, 1905, we filed an opinion in this case, affirming the judgment rendered by the lower court. See 39 Wash. 77, 80 Pac. 1100, where the facts are stated. In that opinion we said:

"In consideration of the fact that the amount of the judgment is not called in question, the second, third and fourth assignments of error are immaterial."

Subsequently, upon petition of appellant for a rehearing, we concluded that the amount of the judgment was called in question, and that we ought to consider the above named assignments, and we therefore granted the petition for a rehearing as to the assignments of error stated. Supplemental briefs were filed, and an argument has been heard, and we come now to consider the case upon those assignments.

The second assignment is to the effect that the court erred in permitting evidence of the fact that but for the injury

respondent's salary would have been increased. The witness Elwell, who was employed as chief clerk in the United States railway mail service, in the district comprising Spokane and Northport, was examined by the respondent for the purpose of showing the compensation received by postal clerks in the class to which respondent belonged at the time of the injury; also, as to the fact that, before being assigned to a run, applicants were required to pass the civil service examination. He was then asked the following question:

"Q. Now, what salary does he get when he becomes a regular mail clerk? A. On that run, the run on which he was at the time of the accident, the salary commences at $800 a year for—let's see, Mr. Williams would have probably sixty days to serve at the rate of $800 a year. Then, if his examination was satisfactory and if his work was satisfactory, he would then have been promoted to $900 a year. Then he would be put in the $1,000 class."

The witness was then interrupted and stated that, after each of these periods, another examination was necessary. An objection was then made that the evidence was too remote. This objection was overruled, and the witness proceeded:

"He would be in the $1,000 class. He would remain in that class until there was a vacancy in the $1,200 class, which is the highest class on the run at the present time."

Appellant urges that this evidence is purely speculative and conjectural, but we think not. The respondent was working under civil service rules. He had already passed his principal examination and his promotion to the $900 and $1,000 classes was reasonably sure to follow. In fact, after his injury and before his trial, he had been promoted from the $800 to the $900 class, but was unable by reason of his injury to go about his work. This case is unlike those cases where promotion depends upon the will of some individual or is speculative in other respects. It is governed by fixed rules, which being complied with promotion follows of course.

The third assignment is that the court erred in permitting

certain cross-examination of Dr. Potter, a witness for appellant. It appears that Dr. Potter had been called by former attorneys for the respondent to make examinations of the respondent. These examinations were made by Dr. Potter in his professional capacity. Dr. Potter was not called as a witness for the respondent, but he was called for the appellant, and testified without objection. He detailed the condition in which he found the respondent, and gave his opinion of the results which would follow. On cross-examination counsel for respondent, over appellant's objection, was permitted to ask questions as follows:

"Q. Now, did you ever hear of § 1649, second volume of Hill's Code, subdivision 4, which reads as follows: . . . A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action as to any information acquired in attending such patient, which is necessary to enable him to prescribe or act for such patient? A. I never read the statute. Q. Did you ever hear there was such a statute? A. I have heard the matter discussed within the last two or three days. Q. Did you not, when you came on the witness stand to testify, know that, in your position as surgeon and physician to this boy, you had no right to come here and testify to what you found out about him, unless he consented to it? A. I did not. . . . Q. Do you consider that it is professional decency, when you are employed by a man, when you are taken into his secret bed chamber to treat him and find out all you know about him, is it considered decent in your profession to run over and tell it to somebody else who is hostile to that person? . . . A. Please repeat that. Q. I say, when you are employed by a sick man to go to his bedside and attend him, and he gives you every opportunity to get information concerning him, and you do go on and get that information by visit after visit, is it considered decent in your profession to run over and tell somebody else who is hostile to him, or who has interests antagonistic to his, everything you know about him? A. It is unethical under the circumstances as stated."

Other questions along this same line were permitted. Appellant insists that this cross-examination was improper. The

respondent, no doubt, waived his privilege when he permitted the doctor to give his testimony without making any objection thereto. *Lissak v. Crocker Estate Co.*, 119 Cal. 442, 51 Pac. 688; *Briesenmeister v. Supreme Lodge K. of P.*, 81 Mich. 525, 45 N. W. 977; *Lincoln v. Detroit*, 101 Mich. 245, 59 N. W. 617. But he had a right to discredit the witness by showing interest or bias in the case, and legitimate cross-examination was perfectly proper for that purpose.

A wide latitude is usually, and should be, given upon cross-examination, the extent of which must be governed largely by the discretion of the trial court. Such discretion will only be reviewed for abuse thereof. *Fleischner v. Beaver*, 21 Wash. 6, 56 Pac. 840; *State v. Coates*, 22 Wash. 601, 61 Pac. 726. While we think the cross-examination complained of as to this witness is very close to the line of error, because of the apparent unfair inferences which might have been drawn by the jury, yet, by reason of the fact that there were several other reputable doctors who had as good or better opportunities of knowing the condition of respondent as Dr. Potter had, and that these doctors gave substantially the same testimony as Dr. Potter, and against which doctors there was not shown any bias or prejudice or interest in the case, and for the further reason that the discretion of the trial court should not be reviewed except for abuse, we have concluded that the cause ought not to be reversed on this account.

The fourth assignment is that the court erred in permitting the respondent to testify on rebuttal as follows:

"Q. Herbert, while you were at the hospital, what about the claim agents of the defendant company coming frequently to see you and trying to get a settlement out of you? . . . A. Well, he came up there quite frequently. I cannot say as to how often. There was one week there he came two or three times. Now, I don't want to be misunderstood about it. When he first asked me about a settlement— Q. I don't want you to say anything about what he said. Just the fact of his coming here. A. One week he came three times. An-

other week two times. He would drop in once in a while to see how I was getting along.' '

It is contended that the purpose of this evidence was to show an admission of liability on the part of appellant, and that offers of compromise are inadmissible. If the purpose was as stated, there can be no doubt about the inadmissibility of the evidence; but we think this was not the purpose of it under the circumstances of the case. The principal defense of the appellant was that the respondent was in a large measure simulating his injuries. Appellant's evidence tended to show that respondent was afflicted with what the doctors termed "hysterical paralysis," and that the pendency of a lawsuit had a strong tendency to prevent improvement in such cases. The evidence above quoted was received by the trial court upon the theory that it had a tendency to rebut the evidence of the physicians by discrediting their statements that respondent was suffering from hysterical paralysis, because, under such circumstances, the attending physicians would not have permitted the claim agent to visit this respondent. We think the evidence was admissible for that purpose, and for that reason only.

Appellant insists upon this rehearing that the verdict is excessive and should be reduced, even if we do not reverse the case. The verdict and judgment in the case was for $33,000. We have gone carefully over all the evidence in the case, and are satisfied that the verdict is largely excessive. It is true, the respondent is a young man of good habits, and that he is severely injured; but there is much doubt in our minds, as there must have been in the minds of the jury, that he is permanently injured. Conceding, however, that he is partially paralyzed, and that he can never walk and never regain the sight of his left eye, we think that $20,000 is a large measure for his injuries. The respondent in this case was no more severely injured than the respondent in *Melse v. Alaska Commercial Co., ante* p. 356, 84 Pac. 1127, where we

reduced the verdict from $20,000 to $14,000. But respondent in this case is considerably younger and received at the time of his injury about the same amount of wages. Respondent insists that appellant cannot now raise the question of the excessiveness of the verdict, because it was not clearly pointed out in the opening brief. This was one of the grounds for a motion for a new trial, and the opening brief assigns the overruling of the motion as error. This is sufficient to raise the question.

The cause is therefore remanded to the lower court to grant a new trial unless the respondent, within sixty days after the remittitur is filed below, shall remit $13,000 from the judgment. If such sum is remitted within the time named, the judgment will stand affirmed for $20,000, which shall bear interest from the date of the verdict. Appellant shall recover costs of this appeal.

HADLEY, CROW, and ROOT, JJ., concur.

DUNBAR, J. (dissenting)—I dissent. Not because I am convinced that the judgment is not too large, but because that question is not involved in this case, and I think it is an excellent idea for this court to try causes on the issues which are made, and to confine itself to such issues. Ordinarily the practicing attorneys of this state can be relied upon to raise such issues in their briefs as they deem material to the best interests of their clients. Appellant's original brief presents twelve assignments of error, distinctly and concisely stated as follows: First, the court erred in refusing appellant's request to charge the jury to find for the defendant. Second, the court erred in overruling appellant's objection occuring in the examination of H. A. Elwell, a witness on behalf of respondent. The third and fourth assignments are, also, in relation to the admission of testimony. The fifth was in relation to allowing counsel to read from law books and authorities in the presence of the jury. The sixth, seventh, eighth, ninth, tenth and eleventh relate to the alleged error

of the court in giving and refusing to give instructions. The twelfth is that the court erred in overruling appellant's motion for a new trial.

If there is any intimation in these assignments of error that the verdict is excessive, it would certainly take a very powerful judicial microscope to discover it. And the argument which follows these assignments is addressed specifically to the errors assigned, and no claim was made, either by assignment of error or by argument, written or oral, that the judgment was excessive. This was understood by the respondent, who says in his answering brief, page 40: "Defendant did not contend in the lower court and does not contend here that the damages awarded were excessive." This statement is not challenged by the appellant in its reply brief, but the reply argument is confined to answering the respondent's contentions in relation to the errors assigned. On these briefs and oral argument, the cause was submitted to this court. But, says the majority, the question of the excessiveness of the verdict was raised because it was one of the grounds for a motion for a new trial, and the opening brief assigns the overruling of the motion as an error. This would have been sufficient, no doubt, to preserve the question and make it available for assignment, if it had really been assigned; but it is the assignments of error that this court deals with, and not what might have been assigned.

The object of a brief, manifestly, is to apprise the court and opposite counsel of the issues which are involved, and to assist the court in determining such issues. This is of so much importance that it has been provided for both by statute and by rule of this court. Section 15, page 127, of the Laws of 1893, provides for the service by the appellant of his opening brief, and adds, "which brief shall clearly point out each error that appellant relies on for a reversal." And to prevent any possible misleading of the respondent by any omission in the appellant's opening brief, the latter part of the

section provides further: "But the appellant shall not be permitted to urge in any such reply brief or statement of additional authorities or on the hearing, any grounds for reversal not clearly pointed out in his original brief." This law has been supplemented by this court by rule. Subdivision 2 of rule 8 provides, "each error relied on shall be clearly pointed out;" and rule 12 unmistakably points out what the result will be if this order is not obeyed. It is as follows: "No alleged error or mistake of the superior court will be considered by the supreme court unless the same be clearly pointed out in the appellant's brief." And yet, in the face of the statute and of its own expressed mandate, this court reverses a judgment upon an error which is not pointed out clearly or otherwise, and which was therefore presumably not relied upon. It cannot be possible that the court intends to announce a rule that will permit a litigant to come to this court, try his case upon errors specifically assigned, calling attention of the court and of opposite party, both by brief and oral argument, only to such assignment, and then, if defeated, ask by petition for rehearing for a reversal upon grounds first mentioned in such petition, upon the theory that he had assigned as error the overruling of the motion for a new trial. This would be inviting the use of masked batteries in contests before this court, whereas in all jurisdictions in the civilized world, litigants are compelled to wage an open warfare.

The object of the statute and the rule is obvious. It is to prevent an appellant, by dragnet assignments, from dumping in for the consideration of this court an undigested and undeterminable mass of records in which are incorporated questions both material and immaterial, and placing upon the opposing counsel and upon the court the burden of discovering, if possible, what rulings of the lower court he relies upon as error. In fact, this court has spoken with no uncertain sound on this subject. In *Haugh v. Tacoma,* 12 Wash. 386,

41 Pac. 173, 43 Pac. 37, wherein the opinion was written by Judge Gordon, the learned counsel now representing the appellant in this case, appellant's brief was stricken and the judgment affirmed because the errors relied upon for reversal were not clearly pointed out. In this case the errors are clearly pointed out and discussed, but they do not include excessive damages. So that it is more certain in this case what errors were relied on than in the *Haugh* case, *supra*, where there was simply indefiniteness and uncertainty, and where the appellant was anxious by oral argument to make clear to the court the errors relied upon. But the learned judge who wrote the opinion in that case, in answer to the insistence of the counsel for appellant in a petition for rehearing that his points taken in connection with the statement of facts became intelligible, said: "Doubtless such is the case, but we think they should be made intelligible in the brief." And in that case, after citing the statute and the rule, we said: "We think that, in the preparation of the brief, counsel has wholly disregarded the plain provisions of the statute and the rules of this court," and quote approvingly from *Chicago etc. R. Co. v. Moffit,* 75 Ill. 524, where the court said, "Counsel operate a dragnet, but ask the court to do the sorting;" and from *Chicago etc. R. Co. v. Van Vleck,* 40 Ill. App. 367, the following: "We decline to enter upon the consideraton of alleged errors thus bundled upon us." Also, the following was quoted from *Brown v. Tolles,* 7 Cal. 398: "If a party complains of error, and seeks a reversal, it is due to us that he should show wherein the error consists. We cannot be expected to act in the double capacity of counsel and judges . . . and we cannot . . . be expected to wade through the record to find argument, or invent pretexts for reversing the cause." And much more was said in that case, to the effect that the brief must point out the errors relied upon without putting the neces-

sity upon this court of resorting to the record to determine the material errors.

In *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 584, while the motion to strike the brief was denied for the reason that it had complied with the law, we said:

"In this connection it may not be improper to observe that, in our opinion, it was the purpose of the legislature in enacting the law concerning the assignment of errors, to require the appellant to so specifically set forth each and every alleged error that an inspection of the brief alone will fully disclose the same. It was not the intention to require this court to search through the entire record in a case in order to determine what errors may have been committed, and if a proposed assignment is such as to require it to do so, it will be entirely disregarded."

I will ask how this court would be able to determine from the assignment relied upon by the majority, viz., that the court erred in denying the motion for a new trial, in what particular it was that the court erred, without an investigation of the record, laying aside assignments which were specifically made in the brief. Certainly there appears nothing in the brief to indicate that the assignment of error was based upon the fact that the verdict was excessive. In conformity with the rule announced in the *Haugh* case, we struck appellant's brief in *Perkins v. Mitchell etc. Co.*, 15 Wash. 470, 46 Pac. 1039, for the reason that the brief did not point out the errors relied upon for reversal. The rule was again announced in *Doran v. Brown*, 16 Wash. 703, 48 Pac. 251, and the brief stricken for the same reason. And in *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250, we refused to consider a contention of appellant made in the argument because it was not included in the assignments of error.

Yet in the face of its own decrees and, I think, of universal authority under statutes and rules of courts similar to ours, this judgment is reversed, for it is in effect a reversal of the judgment. Says the majority: "The appellant in-

sists upon the rehearing that the verdict is excessive, and should be reduced even if we do not reverse the case." This is evidently an inadvertence in the statement of the case. The learned counsel for the appellant was consistent in his application, but the court evidently does not yet seem to understand his position, for while, of course, everything else being lost he would be glad, and so stated, of a modification of the judgment, his position is, in his petition for rehearing, not that the verdict should be modified because it was excessive, but because errors were committed by the court which entitled him to a new trial. On page 8 of the petition it is said:

"We are not asking for a modification of the judgment. We are simply asking what the law guarantees us, viz., a fair trial; and until we have the verdict of a jury upon a fair trial, where incompetent and prejudicial testimony is excluded and competent and relevant testimony of witnesses is received without such witnesses being unjustly held up for ridicule and disgrace, it is pure speculation to undertake to say what verdict or in what amount the truth and justice of the case requires."

As showing the object of the petition, and just what was asked by counsel for appellant, in the closing of the opening petition on page 17, it is said:

"While much, very much, might be said and strong grounds advanced for a rehearing upon the questions which you have discussed, yet to avoid confusion and in the firm belief that we are entitled to a rehearing because of the disposition made of assignments 2, 3 and 4, we are willing to confine this petition to their consideration only."

Two, three and four were the assignments which this court has just deliberated upon, viz., the errors of the court alleged in the introduction of testimony. Appellant's counsel, not only in his oral argument but in his reply brief on petition for rehearing, has not only not asked this court to modify the judgment, but has strenuously and, I think, logically in-

sisted that this court has no right to do so; and in his reply brief on the petition for rehearing—the last expression of counsel on the subject—on page 10, we find the following:

"We have said elsewhere in this brief that the injury arising from the incident complained of was more harmful to the case of the defendant than if the court had arbitrarily refused to allow the witness to be sworn. Is it logical to say that the remedy for such an error is to reduce the amount of the verdict? To what conclusion would you thus be led? Supposing that instead of depriving the defendant of the benefit of the testimony of one witness, the court had ruled out the testimony of two witnesses, you would naturally deduct a still greater sum from the verdict; and 'by the same token,' if the trial court arbitrarily shut out all of the defendant's testimony, you would meet the error by adjusting the amount to accord with your own views. Surely such would not be administering justice by the usual course, and the constitutional guaranty of 'fair trial' becomes meaningless."

Counsel for appellant has been consistent in the different presentations of the case. The inconsistency, in my judgment, is with this court. If prejudicial error was committed by the court on questions raised on the second, third and fourth assignments, which we refused to pass upon at the first trial, the judgment should be reversed. But this court, upon a final investigation of such alleged errors, has found that prejudicial error was not committed. That being true, the only logical thing to do is to affirm the judgment.

[No. 6036. Decided April 28, 1906.]

WILLIAM KIRBY, *an Infant by His Guardian ad litem, Thomas Armstrong, Respondent,* v. THE WHEELER-OSGOOD COMPANY, *Appellant.*[1]

MASTER AND SERVANT—YOUTHFUL EMPLOYEE—DUTY TO WARN AS TO DANGERS OF OPERATION OF RE-SAW. The court cannot say, as a matter of law, that as to a youth of the age of sixteen years, without any experience under the existing conditions, a master owes no duty to instruct him as to the apparent dangers in connection with the operation of a re-saw.

DAMAGES—EXCESSIVE VERDICT—LOSS OF ENDS OF FINGERS. A verdict for $5,000 damages for the loss of the ends of three fingers of the right hand and the stiffening of the joints of the thumb is excessive, and should reduced to $3,500.

Appeal from a judgment of the superior court for Pierce county, Linn, J., entered June 8, 1905, upon the verdict of a jury for $5,000 for personal injuries sustained in the loss of ends of the fingers. Affirmed on condition of remitting $1,500.

Charles Bedford (G. M. Emory, of counsel), for appellant.
Walter Christian and *P. C. Sullivan,* for respondent.

FULLERTON, J.—This is an appeal from a judgment entered in favor of the respondent and against the appellant for personal injuries. The record discloses that the appellant was operating a sash and door factory, and that the respondent was one of its employees. At the time of receiving the injury, the respondent was a minor, having just entered upon his sixteenth year. He had then worked for the appellant something over three weeks, doing various duties, such as cleaning up and shoveling sawdust, bearing away lumber from the planer, and other machines; one of such machines being the re-saw, a machine used to rip inch lumber to lumber

[1]Reported in 85 Pac. 62.

of smaller dimensions. He was put at work at the re-saw at about the beginning of the third week of his employment and worked there, as he says, for a week or so, when he was directed to do other work. After a few days, he was again told to go to work at the re-saw. He commenced at seven o'clock in the morning, and had worked until about ten o'clock, when he brought his hand in contact with the saw, and received the injuries for which he sues.

When the appellant was first employed at the re-saw, the lumber being ripped was of considerable length, most of it being from twelve to twenty-four feet. Lumber of that length, after passing through the machine, would fall on rollers, where it would remain until taken away, giving the off-bearer no trouble to keep up with the machine. When he went back the second time, however, the pieces being put through were only about four feet in length. These, the respondent says, proved to be more difficult to handle than the longer pieces, as they would fall between the rollers, and pile up during the time he was changing the loaded truck for an empty one. He further says that he found that he could work more rapidly from the side of the machine than from the end, and changed his position to the side, and that after he had worked there some twenty minutes, or long enough at least to load one truck and part of another, his hand came into contact with the saw. He was not able to give any very clear description as to the manner in which he was hurt; saying that he did not know any more than that he "was reaching right near the saw and taking the stuff out and piling it on the truck," when the accident happened. The appellant's foreman testified that his hand must have come in contact with the top of the saw, as the board that was then in the saw was bloody, and showed the indentations of his fingers where the saw had pressed them against the board at the time they were cut off.

The respondent bases his right to recover on the contention that the appellant exposed him to a danger which he did

not understand or appreciate, and with respect to which he was not suitably warned and instructed. The evidence on the question of warning and instruction was conflicting. The respondent testified that he was not instructed at all how best to perform his duties, or warned as to the dangers of particular methods; testifying in this connection that he took his place behind the machine in the first instance because he had seen others stand there, and that he changed afterwards because he thought he could best perform his duties from the position last taken. The appellant's testimony was to the effect that he had been fully warned and instructed as to all matters essential to his safety. But since the jury found for the respondent we must assume that his version of the matter is the correct one.

The appellant, however, argues—and this is its main contention—that the dangers to which the respondent was subjected were so open and apparent that he must be held to have understood and appreciated them, and assumed the risk of injury therefrom even though he was not specially warned concerning them. Had the respondent been a man of mature years and possessed of ordinary intelligence and discretion, we would have no hesitancy in saying that the rule invoked should be applied to his case, and a recovery denied him. But, as we have often said, the same rule cannot be applied to the young that is applied to adults. The well-known characteristics of those of immature years, however intelligent they may be, to act quickly and rashly upon impulse makes it hazardous to their lives and limbs to employ them around exposed and dangerous machinery under any circumstances, but extremely so when they have not been instructed as to the safe manner of performing their duties, and warned against the dangers of adopting other and unsafe ways. Therefore, with respect to the children who are not likely, by reason of their immature years and lack of experience, to fully understand and appreciate the dangers to which they are exposed,

it is made the duty of the employer, contrary to the rule with respect to adults, to warn them, even against open and apparent dangers. But while the rules themselves are well understood, difficulties arise in their application. There is a time when a child is so young that the court can say, as a matter of law, that to employ him around dangerous machinery without fully instructing him as to the open and apparent dangers would be the grossest kind of negligence. So there comes a time in this same child's life when the court can say, as a matter of law, that a failure to warn him of the open and apparent dangers is not negligence. Between these two extremes, however, there is, and from the nature of things there must be, a debatable ground—a time when the inferences to be drawn from the fact are disputable—when the court cannot say as a matter of law that the omission to warn is or is not negligence. In such cases it is the province of the jury to draw the inference, and either party has the right to have the question submitted to them.

Applying these principles to the case at bar, we are of the opinion that the court did not err in submitting the facts to the jury. As we say, the respondent had just entered upon his sixteenth year, and the experience he gathered in the few weeks he was in the appellant's employ was the only experience he had had with machinery. Although he had worked at this particular machine before his injury, his experience did not aid him on his return for the reason that the conditions were entirely different. When first at the machine, long pieces were being ripped, and he had abundant time to take care of them, for they would fall naturally upon the rollers. On his return the pieces being ripped were short. Some of these would fall between the rollers and block the way of others, causing the pieces to pile up and fall back towards the machine. The pieces on top and the ones he must reach first would be next to the machine, and naturally he took that position where he could work the more rapidly. Whether

or not in doing so he assumed the risk of injury, we think, under all the circumstances, was a question for the jury.

It is assigned that the court erred in giving certain instructions, and in refusing to give certain others. These we have examined, but find no error in the rulings made.

The respondent lost the ends of the first three fingers of his right hand, and his thumb was split and the joints left stiff, leaving him the full use of the little finger only. The verdict was for five thousand dollars, and the appellant complains that it is excessive. Damages of this character are the most difficult of all damages to measure in money, and are peculiarly within the province of the jury. For this reason, courts allow many of such verdicts to stand notwithstanding they may feel as individuals that the sum allowed is greater than they would have consented to had the question been submitted to them primarily. In this instance, however, we feel that the verdict is larger than can be justified, even taking the most liberal view of the evidence, and have concluded that it ought not to be permitted to stand for a greater sum than $3,500.

The cause will be remanded to the superior court with instructions to allow the respondent thirty days after notice to him that the remittitur has reached that court in which to remit from the judgment $1,500. If the remission be made the judgment will stand affirmed, but if not made a new trial will be granted.

HADLEY, DUNBAR, and CROW, JJ., concur.

[No. 6038. Decided April 28, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. CLARENCE D. HILLMAN *et al.*, *Appellants*.[1]

CRIMINAL LAW—CONSPIRACY—INFORMATION—SUFFICIENCY. An information sufficiently charges a conspiracy to defraud when it alleges that two persons conspired to cheat and defraud a person of a certain sum of money, particularly setting forth the acts and things done pursuant thereto.

SAME—EVIDENCE—NOTICE OF NAME OF PARTY DEFRAUDED. Where persons conspire to defraud whomsoever may be entrapped by their schemes, it is not necessary to prove that any particular person was in their minds at the time.

VENUE—PREJUDICE—SENSATIONAL NEWSPAPER ARTICLES AND ASSOCIATION TO CREATE PUBLIC SENTIMENT. Where public sentiment has been aroused in the community by sensational newspaper articles, and by an association organized for the purpose of creating public sentiment against the accused, to such an extent that it appears that they cannot have a fair trial, it is error to refuse to grant a change of venue.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 5, 1905, upon a trial and conviction of the offense of conspiracy to defraud. Reversed.

G. M. Emory and *Graves, Palmer, Brown & Murphy*, for appellant.

Kenneth Mackintosh and *John F. Miller*, for respondent.

PER CURIAM.—Appellants were informed against upon the charge of the crime of conspiracy to defraud. They were convicted, and a judgment and sentence entered against them, from which this appeal was taken.

It appears that appellant Hillman was engaged in platting land into small tracts, in the vicinity of the city of Seattle, and particularly at one place designated as the "Garden of Eden." It was claimed by the state that, in order to make sales of his property, he, by means of newspaper advertise-

[1]Reported in 85 Pac. 63.

ments and other representations, misled, defrauded and cheated various people, and particularly the complaining witness herein, one J. H. Cann.

The appellants contend that the information does not state facts sufficient to constitute a crime. This instrument, after formally accusing the appellants, and each of them, of the crime of conspiracy to defraud, states that the offense was committed as follows:

"They, the said C. D. Hillman and Lawrence S. Forrest, in King county, Washington, on the 12th day of October, 1904, then and there wickedly and injuriously devising, designing and intending to cheat, wrong and defraud one J. H. Cann of his money and property, did then and there, and theretofore unlawfully, wilfully and fraudulently combine, conspire, confederate and agree together with a unity of mind and common purpose and aim to get and obtain, knowingly, designedly, falsely, fraudulently and unlawfully by means of false pretenses, subtle means, fraud, cheat, subterfuge and device, the sum of one hundred and fifty dollars of the value of one hundred and fifty dollars in lawful money, the money and property of the said J. H. Cann, with intent then and there to cheat, wrong and defraud the said J. H. Cann of his said money; . . . "

This is followed by a long and circumstantial statement of the various acts and things done by said appellants in carrying out the said conspiracy to defraud, all of which things so done are alleged in the information to have been done pursuant to said conspiracy to defraud. Under the liberal rule of interpretation enjoined by the code, we think this information was sufficient.

It is strenuously urged that the evidence adduced on the part of the state at the trial is fatally at variance with the allegations of the information, for the reason that the latter charges the appellants with having conspired to defraud one J. H. Cann, whereas the evidence shows that the appellants did not know said Cann at the time they made the conspiracy, and does not show that he was in their minds as an

intended victim at that time, but merely shows that their conspiracy was to defraud such persons as might be entrapped thereafter, without reference to any particular individual or person. Appellants have cited some authorities which support their argument, but we are convinced that the later decisions, and the greater weight of the authorities, are contrary to their contention, and we do not think their position can be sustained upon principle. Where persons conspire to defraud whomsoever may be entrapped in the meshes of their schemes, and are subsequently prosecuted at the instance of a victim thus ensnared, we think it may be said in contemplation of law that their conspiracy was to defraud that victim; and we do not think that such conspirators so charged should be permitted to escape by saying that, when they plotted to cheat and defraud whomsoever might fall a prey to their machinations, they did not have in mind the particular individual who was subsequently defrauded. To allow this would be to sanction a rule inconsistent with the spirit of our laws and obnoxious to the best interests and welfare of the public. *People v. Arnold,* 46 Mich. 268, 9 N. W. 406; *People v. Gilman,* 121 Mich. 187, 80 N. W. 4, 80 Am. St. 490, 46 L. R. A. 218; *Commonwealth v. Rogers,* 181 Mass. 184, 63 N. E. 421.

A motion was made on the part of appellants for a change of venue from King county where the offense is alleged to have been committed and where the trial subsequently occurred. Affidavits are set forth in support of said motion, which allege that the public press of the city of Seattle, for a long time prior to this prosecution, had contained a large number of articles reflecting upon the business integrity and honesty of affiants; that said articles purported to deal with alleged facts regarding the matters referred to in the information, and with the testimony given in the justice's court; that by far the greater part of said published statements and insinuations assumed the guilt of the defendants; that said statements were grossly untrue and contained such perversions and omissions as to make the facts appear very unfavorable

to these defendants, and to create a deep-seated prejudice against them in the mind of the public throughout King county; that said newspapers had a very large circulation within said county, and were read by almost every family therein, and had the effect of creating the general belief that these defendants were guilty of the matters charged against them. It was further alleged that there was an organization known as the "Hillman Victim Association," composed of a large number of people, organized for the purpose of creating public sentiment against appellants, and particularly against appellant Hillman, which said association by means of public meetings and individual efforts, and by mailing postal cards reflecting upon the character of said Hillman, had done much to arouse prejudice against these appellants; and that it was impossible by reason of the intense feeling against these appellants, for them to have a fair trial in said King county. A large number of newspaper clippings were attached to these affidavits. A large part of these extracts were of an inflammatory and sensational character, often with flaring headlines, and calculated to attract much attention. There was one affidavit signed by something over thirty residents of King county, wherein the affiants stated that they had read the unfavorable comments in the newspapers, and had heard them discussed by large numbers of people; that said articles and discussion dealt with the innocence or guilt of the defendants, and that the same were most always unfavorable to defendants; that the comments caused by said publications had been so widely spread that the public mind, in their opinion, was prejudiced to such an extent that a fair trial could not be had in the county; that they had heard of the organization formed for the purpose of harassing said Hillman in the courts, and elsewhere, and that the efforts of said association were reported to be very injurious to said Hillman.

Upon their *voir dire,* nearly all of the jurymen stated that they had read more or less of these newspaper articles, although the accepted jurors believed that they were not so

affected as to prevent them from acting fairly and impartially as jurymen. The affidavits referred to were not controverted, and we must accept the statements therein, so far as they are consistent with themselves, as the truth. An examination of the newspaper articles complained of shows that there were large numbers of them that were very prejudicial to the defendants. Numerous sensational articles are shown, and there could be no doubt of their being well calculated to inflame the public mind. These facts being true, and it appearing that these papers were widely circulated throughout the county, and that large numbers of people were involved or affected by Hillman's transactions, and the examination of the jurors showing that nearly all of them had read more or less of these articles, we cannot escape the conclusion that a showing was made of a condition of the public mind not permissive of a fair trial. The law contemplates and guarantees to every defendant a fair and impartial trial, according to the usual and ordinary forms of law; and it is incumbent upon the courts to see that this purpose and guarantee are made effectual. The repeated and continuous publications hereinbefore referred to, seconded by the efforts of the Hillman Victim club, as set forth in the affidavits, were well calculated to arouse in the public mind that prejudice and antagonism which the affidavits alleged to have existed against these appellants. We do not think the defendants in a criminal case should be forced to trial in such an environment. The refusal of the court to grant the motion for a change of venue was error.

Several other errors are assigned, two or three of which we regard as serious; but it will be unnecessary to discuss them here, for the reason that the matters complained of will doubtless not arise upon a new trial.

The judgment of the superior court is reversed, and the cause is remanded with instructions to enter an order for a change of venue, unless said motion shall be waived by appellants.

[No. 5960. Decided May 10, 1906.]

WESTERN TIMBER COMPANY, *Appellant*, v. KALAMA RIVER LUMBER COMPANY, *Respondent*.[1]

FRAUDS, STATUTE OF—SALE OF LANDS BY CORPORATION—MEMORANDUM OF SALE—RESOLUTION OF DIRECTORS—SUFFICIENCY. A resolution of the board of directors of a corporation authorizing the sale of lands of the corporation, stating the terms of sale, a copy of which signed by the president as the representative of the corporation, was delivered to the purchaser, constitutes a sufficient memorandum of sale to take the sale out of the operation of the statute of frauds, and the same can be specifically performed.

SAME — MUTUALITY OF CONTRACT — ACCEPTANCE OF PURCHASER — BRINGING ACTION FOR SPECIFIC PERFORMANCE. A resolution by the board of directors of a corporation authorizing the sale of its lands, is not insufficient as a memorandum of sale, or void for want of mutuality, because not signed by the purchaser, where the purchaser's assent thereto is shown by promptly bringing an action for the specific performance of the contract of sale.

VENDOR AND PURCHASER—CONTRACT OF SALE—ACCEPTANCE—EVIDENCE—SUFFICIENCY. The evidence, although conflicting, is sufficient to establish that the purchaser of lands from a corporation accepted a contract of sale, where it appears that the board of directors of the corporation adopted a resolution authorizing the sale, and witnesses testified that it was accepted by the purchaser, that the notes were executed and cash procured for the payments, and that the vendor only rescinded the sale after it had received a better offer, pending negotiations to perfect the title, which it had fully intended to perfect.

VENDOR AND PURCHASER—CORPORATIONS—SALE BY OFFICER—AUTHORITY—RATIFICATION. Where the principal stockholder and president of a corporation arranges an oral sale of its lands, his acts are ratified by the adoption of resolutions by the board of directors authorizing the sale, and the acceptance of the terms by the purchaser.

SAME—ACCEPTANCE BY PURCHASER. Upon the sale of lands of a corporation, authorized by resolutions of the board of directors, the fact that the purchaser asked the adoption of further resolutions, upon the advice of attorneys examining the abstract, does not show that the sale was not accepted by the purchaser, but rather the contrary.

[1]Reported in 85 Pac. 338.

Appeal from a judgment of the superior court for Cowlitz county, McCredie, J., entered June 23, 1905, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for specific performance of a contract for the sale of timber. Reversed.

Coovert & Stapleton, for appellant, contended, among other things, that a resolution adopted by the directors of a corporation authorizing the sale of real estate, which contains all the essential elements of a valid memorandum as to terms, etc., and signed by the president and secretary, fully answers the requirements of the statute of frauds. Brown, Statute of Frauds (5th ed.), § 346; Cook, Stockholders, § 714; *Texas etc. R. Co. v. Gentry,* 69 Tex. 625, 8 S. W. 98; *Argus Co. v. Mayor,* 55 N. Y. 495, 14 Am. Rep. 296; *Johnson v. Trinity Church Society,* 11 Allen 123; *Tufts v. Plymouth Gold Min. Co.,* 14 Allen 407; *Central Land Co. v. Johnston,* 95 Va. 223, 28 S. E. 175; *Grimes v. Hamilton County,* 37 Iowa 290. The contract is enforcible though not signed by both parties, since to satisfy the statute of frauds it need be signed only by the party to be charged, and the act of filing a bill for specific performance binds the plaintiff. Statute of Charles II; Pomeroy, Specific Performance, §§ 75, 76, 170; 2 Warvelle, Vendors, p. 747; 26 Am. & Eng. Ency. Law (2d ed.), 48; 29 Id. 858; 44 Cent. Dig. 1219; *Woodruff v. Woodruff,* 44 N. J. Eq. 349, 16 Atl. 4; *South etc. R. Co. v. Highland Ave. etc. R. Co.,* 98 Ala. 400, 39 Am. St. 74; *Brown v. Munger,* 42 Minn. 482, 44 N. W. 519; *Central Land Co. v. Johnson, supra;* Brown, Statute of Frauds (5th ed.), § 366. The request for further resolutions went only to the validity of the conveyance and could not be treated as a refusal to carry out the agreement. *Vittum v. Estey,* 67 Vt. 158, 31 Atl. 144; *Dingley v. Oler,* 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Johnstone v. Milling,* 16 Q. B. Div. 460; Pomeroy, Specific Performance, 111, notes; *McPherson v. Fargo,* 10 S. D. 611, 66 Am. St. 723.

J. F. Boothe, for respondent, contended, *inter alia,* that neither Hessey nor Turrish, in the absence of some delegation of authority, express or implied, could bind the corporations they represented. *Lyndon Mill Co. v. Lyndon etc. Inst.,* 63 Vt. 581, 22 Atl. 575, 25 Am. St. 783; *Mount Sterling etc. Road Co. v. Looney,* 1 Met. (Ky.) 550, 71 Am. Dec. 491; 4 Thompson, Commentaries on Corp., § 4622. The contract must be complete and certain before specific performance can be enforced. Pomeroy, Specific Performance, §§ 159-161; *Derrick v. Monette,* 73 Ala. 75; *Langellier v. Schaefer,* 36 Minn. 361, 31 N. W. 690. The resolutions were mere preliminaries to the completion of a contract. *Dunham v. Boston,* 12 Allen 375; *Williams v. Bacon,* 2 Gray 387; *Gummer v. Trustees of Omro,* 45 Wis. 384; *Dixon v. Dixon,* 92 Md. 432, 48 N. E. 152. The contract was not enforcible for want of mutuality. Pomeroy, Specific Performance, §§ 75, 76, 163, 166; *Houghwout v. Boisaubin,* 18 N. J. Eq. 315; *Warner v. Willington,* 3 Drewry 523. Plaintiff made no tender of performance and is therefore not entitled to the relief sought. 3 Pomeroy, Equity Jurisp. § 1407; *Askew v. Carr,* 81 Ga. 685, 8 S. E. 74; *Langellier v. Schaefer, supra.*

Crow, J.—This action was instituted by the appellant Western Timber Company, a Washington corporation, plaintiff below, against the respondent Kalama River Lumber Company, an Oregon corporation, defendant below, to enforce the specific performance of a contract to sell and convey a large tract of timber land in Cowlitz county, Washington. Some time in the fall of 1904, one Henry Turrish, the principal stockholder of appellant, who, acting as its manager, controlled its business policy although not an officer or director, had an interview at Duluth, Minnesota, with Mark Hessey, president of the respondent corporation, relative to the sale of said lands by respondent. Said Turrish then offered to purchase said lands for the appellant corporation for the sum of $50,000, one-half cash, the remainder to be

payable in one and two years, with five per cent interest, secured by notes indorsed by certain stockholders of the appellant company. In pursuance of this offer, an abstract of title was furnished by respondent and approved by appellant.

On October 21, 1904, the said Mark Hessey, as president of respondent company, called a meeting of its board of directors at Iron River, Wisconsin. At this meeting only three directors were present. The board consisted of five directors, to wit: Mark Hessey, Winfield E. Tripp, their respective wives, and one M. T. O'Connell. These five directors owned all of the capital stock of the respondent company, the wives of Hessey and Tripp holding stock which belonged to their husbands, in order that they might qualify as directors. The directors present at the meeting of October 21, 1904, were Mark Hessey, Winfield E. Tripp, and M. T. O'Connell. At this meeting the following resolution was unanimously adopted and entered upon the minute book of the corporation:

"Resolved, That the timber lands in township 7, north of range 4 east, and township 7, north of range 3 east, of the Willamette meridian, now owned by the Kalama River Lumber Company, be sold and conveyed to the Western Timber Company for the sum of $50,000; $25,000 to be paid at the sealing and delivering of a warrantee deed to the Western Timber Company, and $12,500 to be paid with notes due on or before one year from date, with interest at 5 per cent per per annum, and $12,500 to be paid with notes due on or before two years from date, with interest at 5 per cent per annum. It is further

"Resolved, That the cash and notes received for said timber lands shall be divided between the stockholders of the said Kalama River Lumber Company, according to the stock held by the said stockholders, upon the surrendering to the said company their stock, duly assigned and transferred to said company."

After the adoption of said resolution Mr. Hessey, as president of respondent company, on October 22, 1904, delivered a signed copy thereof to Mr. Turrish, as the representative of the appellant corporation; and also handed to Mr. Turrish

the minute book and certain papers of the respondent corporation, which were in turn referred by Mr. Turrish to the attorneys of the appellant corporation, who afterwards prepared a written opinion thereon, calling attention to certain alleged irregularities in the resolution and proceedings. It is not necessary to state these objections in detail, the principal one being based upon the fact that the board of directors had not met within the state of Oregon. Appellant's attorneys suggested that certain steps be taken by respondent to perfect said proceedings and to pass the title. Mr. Turrish handed their written opinion containing said suggestion to Mr. Hessey, who, accompanied by Mr. Tripp, immediately called upon said attorneys and procured from them forms and drafts of the resolutions and proceedings which they had recommended. Mr. Hessey and Mr. Tripp, taking these documents, left the attorneys' office with the expressed intention of complying with their suggestions and completing the transfer. In the meantime Mr. Turrish provided funds for the cash payment, and had the notes for the unpaid purchase money properly executed and indorsed in accordance with the suggestion of Mr. Hessey. A subsequent meeting of the directors of the respondent corporation was called for October 27, 1904, at which time said directors, instead of taking the steps recommended by the appellant's attorneys, adopted the following resolution:

"Resolved, That the resolution adopted at a special meeting of the board of directors of the Kalama River Lumber Co., on the 21st day of October, 1904, agreeing to sell all the timber lands of said company in Cowlitz county, Washington, to the Western Timber Company, be and is hereby rescinded. Also the resolution dividing the cash and notes between the stockholders of said Kalama River Lumber Company adopted on the 21st day of October, 1904, be and is hereby rescinded."

Subsequent to the time Messrs. Hessey and Tripp had conferred with appellant's attorneys, and prior to the meeting of October 27, the respondent corporation received by wire

from Portland, Oregon, an offer of $70,000 for the land. Notice was afterwards given to the appellant, that the respondent's directors had adopted the rescinding resolution of October 27, refusing to complete the sale, and thereupon this action was immediately commenced.

On the trial, findings of fact were made, from which it in substance appears that the respondent owns the lands in Cowlitz county; that Henry Turrish is the principal stockholder of the appellant, living at Duluth, Minnesota, and at the solicitation of Mark Hessey, president of respondent corporation, offered to buy said lands for the sum of $50,000, one-half cash, the balance in one and two years, at five per cent interest; that Mark Hessey, president of respondent, called said meeting of the board of directors at Iron River, Wisconsin, on October 21, 1904, at which meeting three directors being present, the resolution first above set forth was unanimously adopted; that said resolution, the minutes of said meeting, and other papers of the respondent corporation, were thereafter handed by said Mark Hessey, president of respondent, to said Henry Turrish, and by said Henry Turrish were handed to appellant's attorneys, Washburn, Bailey & Mitchell; that on October 22, 1904, the attorneys made a written report or opinion thereon, containing certain objections to the form of the proceedings; that said written opinion was by Mr. Turrish handed to Mr. Hessey, and thereafter Mr. Hessey and Mr. Tripp, another director of respondent, called upon said attorneys for such stockholders' resolutions, directors' resolutions, proxies, etc., as said attorneys desired to be executed; that said Hessey and Tripp left said attorneys' office with said resolutions and directions, with the intent and purpose of calling a meeting to adopt the same; and that said parties called a special meeting of the board of directors, which was held in Iron River, Wisconsin, on October 27, 1904, all five directors being present, at which time the second resolution above set forth was adopted.

The appellant took no exceptions to these findings. It, however, requested the court to make the following additional findings, which were refused: That upon receiving such resolution of October 21, 1904, Mr. Turrish, on behalf of the appellant, then and there assented to all of its conditions, and proceeded to comply therewith by procuring the notes covering the deferred payments, and that at no time thereafter did appellant alter or modify the same or refuse to carry out the terms thereof; that at the trial appellant offered to pay into court, at such time as the court should direct, said sum of $25,000, for respondent, and to deliver the notes of appellant company for $25,000, payable one-half on or before one year, and one-half on or before two years from October 22, 1904. To the court's refusal to make these findings, appellant has excepted. Conclusions of law being made in favor of respondent, judgment was entered thereon, dismissing the action, and this appeal has been taken.

The appellant insists that the trial court erred, (1) in its conclusions of law; (2) in its refusal to make the additional findings requested by appellant; (3) in its refusal to make the conclusions of law requested by appellant, and (4) in entering judgment for respondent and refusing to enter judgment for appellant.

The respondent corporation was formed for the purpose, among other things, of buying and selling timber lands in the state of Washington. The directors were therefore acting within the scope of their authority when they agreed to sell said lands. It appears from the evidence that all of the capital stock of the respondent corporation was owned by its five directors, and as it was anticipated that, in compliance with the suggestions of appellant's attorneys, all of said directors would be present at the second meeting of October 27, 1904, said attorneys waived any objection to the fact that the meeting of said board of directors would be held in the state of Wisconsin and not in the state of Oregon, their view being that all stockholders present would be estopped from

denying the validity of the sale or transfer. The appellant contends that the first resolution of October 21, 1904, authorizing the sale of said real estate, which contains all the essential elements of a valid written memorandum as to terms, and which was signed by the president and secretary of the respondent corporation constituted a full compliance with the requirement of the statute of frauds, as being a memorandum in writing signed by the party to be charged, and as such memorandum had been made and so signed, the respondent's contract to convey can be specifically enforced. We think the resolution was a sufficient written memorandum to constitute a compliance with the requirements of the statute. Brown, Statute of Frauds (5th ed.), § 346; *Texas etc. R. Co. v. Gentry* (Tex.), 8 S. W. 98; *Argus Co. v. Mayor,* 55 N. Y. 495, 14 Am. Rep. 296; *Tufts v. Plymouth Gold Min. Co.,* 14 Allen 407; *Central Land Co. v. Johnston,* 95 Va. 223, 28 S. E. 175; *Grimes v. Hamilton County,* 37 Iowa 290.

It is contended by the respondent that, even though it be conceded that a contract had been entered into between it and the appellant, and although it had signed a written memorandum thereof, still such contract cannot be specifically enforced in equity, for the reason that it is not mutual but unilateral, and that the respondent should not be held to a specific performance for the reason that the appellant, not having signed any written memorandum thereof, could not be held liable in an action for the purchase price. In answer to this suggestion, appellant contends that, by promptly filing a bill in equity and demanding specific performance, it placed itself in a position to have a decree rendered in favor of respondent, forcing it to pay the purchase price. As the adoption of the resolution of October 21, 1904, by respondent was a sufficient compliance with the requirements of the statute of frauds, we think the contention of the appellant that the contract can be specifically enforced must be sustained. The weight of authority seems to be that the statute of frauds is

satisfied if the memorandum be signed by the party defendant in an action for specific performance. The party not signing is not bound unless, as is held by some authorities, he has accepted the same as a valid, subsisting contract. Want of mutuality arising from the failure of one party to sign cannot be successfully pleaded as a defense by the other party who did sign, as the act of filing a bill for a specific performance binds the former, makes him liable, and renders the contract mutual. See, *Woodruff v. Woodruff,* 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380; *South etc. R. Co. v. Highland Ave. etc. R. Co.,* 98 Ala. 400, 13 South. 682, 39 Am. St. 74; Fry, Specific Performance, §§ 448-459; Waterman, Specific Performance, § 201; Pomeroy, Specific Performance, § 170.

"Equity will not direct a performance of the terms of the agreement of one party when, at the time of such order, the other party is at liberty to reject the obligations of such agreement; yet, as in a case where an agreement which the statute of frauds requires to be in writing has been signed by one of the parties only, or when the contract, by its terms, gives to one party a right to the performance which he does not confer upon the other, upon the filing of a bill for enforcement in equity by the party who was before unbound, he thereby puts himself under the obligation of the contract. The contract then ceases to be unilateral; for by his own act the unbound party makes the contract mutual, and the other party is enabled to enforce it." 2 Warvelle, Vendors, p. 748.

In *Perry v. Paschal,* 103 Ga. 134, 29 S. E. 703, the supreme court of Georgia says:

"If a contract for the sale of land, required by the statute of frauds to be in writing, is evidenced by a writing signed by one party only, but sufficient to charge the party signing, such party would be bound to perform the contract. While in such a contract there is want of mutuality of obligation, still if the party in whose favor the writing is executed, though not bound because it is not signed by him, sees proper to waive his right to insist upon the invalidity of the contract, and as evidence of such waiver files a proceeding in a court

of equity to enforce it, thus affirming in writing his willingness to be bound by the stipulations in the contract, he will by such proceeding, though previously not bound, put himself under the obligation of the contract. The contract then ceases to be unilateral; for by the act of the party who was in no way originally bound by the writing the contract becomes mutual, and the other party is thereby enabled to enforce it against him."

In *Engler v. Garrett* (Md.), 59 Atl. 648, the court of appeals of Maryland says:

"Was the contract mutual? This is not disputed in the pleading or in the evidence. It is said that it is not signed by the plaintiff, but this is not necessary, even under the statute of frauds, which only requires the signature of the party to be charged. 'There may be a mutual contract to which both parties have given their assent, though the evidence of such assent may exist in a different form as to the two parties. As to one, it may be verbal, while the other's is expressed by his signature in writing.' Waterman on Specific Perf., § 201. The testimony as to the plaintiff's acceptance of the contract is ample, and, besides this, if there had been doubt on this question, it disappeared when he filed his bill to enforce it."

See, also, Browne, Statute of Frauds (5th ed.), § 366; *Brown v. Munger,* 42 Minn. 482, 44 N. W. 519; *Central Land Co. v. Johnson* (Va.), 28 S. E. 175; *Cummins v. Beavers* (Va.), 48 S. E. 891; *Miller v. Cameron,* 45 N. J. Eq. 95, 15 Atl. 842, 1 L. R. A. 554.

It is contended by the respondent that the resolution adopted by its directors on October 21, 1904, did not constitute a contract upon its part; that it did not result from a previous oral agreement, but that it was merely an offer to convey upon terms named, which offer was never accepted by the appellant, and that by reason of such non-acceptance, no contract was in fact made. On the other hand, it is contended by appellant that the resolution of October, 21, 1904, was the result of a previous oral agreement entered into by Mr. Turrish on behalf of the appellant corporation, and Mr.

authorities, we conclude, (1) that the resolution of October 21, 1904, was a sufficient compliance with the requirements of the statute of frauds; (2) that the appellant at no time refused to accept or perform the contract; (3) that the offer of respondent was accepted by appellant prior to the adoption of the rescinding resolution, and (4) that the contract is one that can be specifically enforced against the respondent. This being true, the trial court erred in dismissing the action. It is ordered that the judgment of the honorable superior court be reversed, and the cause remanded with instructions to enter a decree for specific performance in accordance with the prayer of the complaint.

MOUNT, C. J., DUNBAR, HADLEY, RUDKIN and ROOT, JJ., concur.

[No. 5983. Decided May 19, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Marian E. Harlan, Plaintiff,* v. CENTRALIA-CHEHALIS ELECTRIC RAILWAY & POWER COMPANY, *Respondent.*[1]

EMINENT DOMAIN—BY STREET RAILWAY FOR POWER PURPOSES—RIGHT—NECESSITY OF ANTECEDENT FRANCHISE. Upon a proceeding by a street railway company to condemn land for the purpose of creating the necessary power to operate a street railway system, it is not necessary to show, that the company has acquired all its right of way or obtained all franchises from the cities in which it expects to operate, where it appears that it was proceeding diligently to secure right of way and franchises which had been practically agreed upon.

SAME—CONDEMNATION FOR PUBLIC USES BY CORPORATION ORGANIZED FOR PUBLIC AND PRIVATE PURPOSES. A street railway company, organized for purposes partly private and partly public, may acquire land by the right of eminent domain where the proceedings show that the power is exercised only for its use as a common carrier, and which are not so combined with its private purposes as to be inseparable.

[1]Reported in 85 Pac. 344.

SAME—RIGHT TO CONDEMN—POSSIBILITY OF DIVERSION TO PRIVATE USE. The prevention of the diversion to private uses of private property taken for a public use, rests in the supervisory power of the state rather than in the denial of the exercise of the right of eminent domain.

SAME—PUBLIC NECESSITY—EVIDENCE—SUFFICIENCY. The uncontradicted testimony of the president of a street railway company to the effect that all the power that could be developed by a proposed dam would be required for the uses of the company is sufficient proof that there was a necessity for the taking of the land sought.

SAME—PUBLIC USE—CREATION OF POWER FOR USE OF STREET RAILWAY. Under Laws 1903, p. 366, authorizing street railway companies to condemn land for right of way "and other corporate purposes," a street railway company may condemn land not adjacent to its right of way, for the purpose of developing a water power to create the power for the system, the public being directly interested in such use as a means of acquiring cheap transportation.

Certiorari to review an order of the superior court for Lewis county, Rice, J., entered November 20, 1905, after a hearing on the merits, adjudging a public use and directing the assessment of damages in a condemnation proceeding. Affirmed.

H. S. Elliott and *E. M. Green,* for relator, contended, *inter alia,* that franchises are necessary to constitute the railway a public benefit. Without them there is no public use and the right of eminent domain will not attach. *Healy Lum. Co. v. Morris,* 33 Wash. 490, 74 Pac. 681; *State ex rel. Tacoma Ind. Co. v. White River Power Co.,* 39 Wash. 648, 82 Pac. 150. Electric railroads cannot condemn lands at a distance from their contemplated line, for power purposes, the legislature having by statute placed them in the position, in that respect of steam railroads, which are limited to adjacent lands. Laws 1903, p. 364, § 2; Id., p. 383, chapter 180; Bal. Code, § 4334. The intention of the legislature should control. *Howlett v. Cheetham,* 17 Wash. 626, 50 Pac. 522. Condemnation statutes being in derogation of common right, must be strictly construed. *State ex rel. Attorney General v. Superior Court,* 36 Wash. 381, 78 Pac. 1011; *Matter of*

Water Com'rs of Amsterdam, 96 N. Y. 351; *Miami Coal Co. v. Wigton,* 19 Ohio St. 560. Condemnation for power purposes is not for a public use; it is a matter of internal economy, of interest only to the corporation. *In re Rhode Island Suburban R. Co.,* 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879; *Pittsburg etc. R. Co. v. Benwood Iron-Works,* 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680; *Avery v. Vermont Elec. Co.,* 75 Vt. 235, 54 Atl. 179, 98 Am. St. 818, 59 L. R. A. 817.

W. W. Langhorne, for respondent, contended, among other things, that the writ should be quashed for the reason that the application does not sufficiently show in what manner the lower court exceeded its jurisdiction. Bal. Code, § 5749; *Seattle etc. R. Co. v. Bellingham Bay etc. R. Co.,* 29 Wash. 491, 69 Pac. 1107; *State ex rel. Townsend Gas etc. Co. v. Superior Court,* 20 Wash. 502, 55 Pac. 933; *State ex rel. Smith v. Superior Court,* 30 Wash. 219, 70 Pac. 484; *Bennett v. Wallace,* 43 Cal. 25; *People v. Board of Health,* 33 Barb. 344; *Stewart v. Great Northern R. Co.,* 65 Minn. 515, 33 L. R. A. 427. The sufficiency of the petition for condemnation is sustained by the following: *Lewis County v. Scobey,* 31 Wash. 357, 71 Pac. 1029; 6 Ballard, Law Real Property, 253; *Spokane v. Colby,* 16 Wash. 610, 48 Pac. 248; *Marquette etc. R. Co. v. Longyear,* 133 Mich. 94, 94 N. W. 670; The legislature has expressly conferred upon electric railways the power of eminent domain. Laws 1899, p. 143; Laws 1901, p. 298; *State ex rel. Kent Lumber Co. v. Superior Court,* 35 Wash. 303, 77 Pac. 382; Laws 1903, pp. 366, 384; *State ex rel. Attorney General v. Superior Court,* 36 Wash. 381, 78 Pac. 1011. It is not necessary to do more than show that petitioner is a corporation *de facto.* 1 Clark and Marshall, Private Corp., pp. 239, 240; *Quint v. Hoffman,* 103 Cal. 506, 37 Pac. 514; *Reclamation Dist. v. Turner,* 104 Cal. 334, 37 Pac. 1038; *Osborn v. People,* 103 Ill. 224; *State ex rel. Trimble v. Superior Court,* 31 Wash. 445,

72 Pac. 89. In answer to the objection that public and private uses are blended in the same charter and therefore it is void, counsel cited, 1 Lewis, Eminent Domain (2d ed.), § 160; *Lake Koen Nav. etc. Co. v. Klein,* 63 Kan. 484, 65 Pac. 684; *Denver etc. R. Co. v. Union Pacific R. Co.,* 34 Fed. 387; *Hollister v. State,* 9 Idaho 8, 71 Pac. 541; *Bridal Veil Lumber Co. v. Johnson,* 30 Ore. 205, 46 Pac. 790, 60 Am. St. 818, 34 L. R. A. 368; *In re Niagara Falls etc. R. Co.,* 108 N. Y. 375, 15 N. E. 429; *Chicago R. Co. v. Wiltse,* 116 Ill. 449, 6 N. E. 49; *Phillips v. Watson,* 63 Iowa 28, 18 N. W. 659; *Plecker v. Rhodes,* 30 Gratt. 801; *Berrien Springs Water Power Co. v. Berrien Circuit Judge,* 133 Mich. 48, 94 N. W. 379, 103 Am. St. 438. There is a necessity for the water power sought to be condemned. *Postal Tel. Cable Co. v. Oregon Short Line etc. R. Co.,* 23 Utah 474, 65 Pac. 735, 90 Am. St. 705; 10 Am. & Eng. Ency. Law (2d ed.), 1057, 1058, 7 Lawson, Rights. Rem. and Pr., § 3886; *In re Wellington,* 16 Pick. 87, 26 Am. Dec. 631; Cooley, Const. Law, 336; *Cotton v. Mississippi etc. Boom Co.,* 22 Minn. 372; *Simpson v. Kansas City,* 111 Mo. 237, 20 S. W. 38; *Ford v. Chicago etc. R. Co.,* 14 Wis. 663; *Coster v. Tide Water Co.,* 18 N. J. Eq. 54; *Douglass v. Byrnes,* 59 Fed. 29; *Eldridge v. Smith,* 34 Vt. 484. Every facility needed for the operation, maintenance, and use of a railroad is for public purposes. *People v. Kerr,* 27 N. Y. 188; *New York etc. R. Co. v. Kip,* 46 N. Y. 546, 7 Am. Rep. 385; *Low v. Galena etc. R. Co.,* 18 Ill. 324; *Alabama etc. R. Co. v. Odeneal,* 73 Miss. 34, 19 South. 202; *Olmsted v. Proprietors of Morris Aqueduct,* 47 N. J. L. 311; *Harvey v. Lloyd,* 3 Pa. 331; *Aurora etc. R. Co. v. Harvey,* 178 Ill. 477, 53 N. E. 331. The objection that no franchises have actually been granted to the company has been decided adversely to relator's contention. *Prescott Irr. Co. v. Flathers,* 20 Wash. 454, 55 Pac. 635; *California Southern R. Co. v. Kimball,* 61 Cal. 90.

FULLERTON, J.—The respondent, The Centralia-Chehalis Electric Railway and Power Company, is a corporation organized under the laws of the state of Washington. The objects for which the corporation was formed, as recited in its articles, are many and somewhat varied, and those of a public and quasi-public nature are commingled with those that are purely private. Its primary purpose, however, according to the testimony of its promoter, is to build, equip, and operate electric street railways in the cities of Chehalis and Centralia, and an electric railway between those two cities to be connected to and operated with the street railways, for the purposes of carrying passengers and freight for hire.

For the purpose of generating the necessary electric current to operate its railways, the respondent sought to create a water power on the Chehalis river. It purposes to erect at the site selected a dam across the river, some sixty or sixty-five feet high, which will at once create the necessary fall for power purposes and provide a storage basin which can be drawn upon during the dry season when the natural flow of the river may be insufficient to produce the required power. The dam when constructed will cause the water to back up and overflow a considerable area of land not now covered by water, a part of which belongs to the relator. The respondent was unable to agree with the relator as to the compensation to be paid for the land taken and damaged belonging to him, and brought an action to condemn under the statutes of eminent domain. After a hearing the court made the preliminary order adjudging the use to which the respondent intended to apply the property to be a public use, that a necessity existed for its taking, and ordered the question of the amount of compensation to be paid the relator to be submitted to the determination of a jury. This proceeding was brought to review that order.

The relator first contends that the use to which the respondent contemplates putting the property is not a public

use. The relator does not deny, of course, that the operation of a system of electric railway, between and within the cities of Centralia and Chehalis, for the purposes of carrying passengers and freight for hire, would be a public use, within the meaning of the statutes and the constitution, nor does he contend that it is beyond the powers of the court to condemn his land for the purposes of creating the necessary power to operate that system. But he says that the respondent has not proceeded far enough with its scheme to demonstrate that it will be permitted to construct and operate its proposed railways, since it was made to appear by the evidence that it had not procured franchises from the cities of Centralia and Chehalis permitting it to construct its proposed railways within their boundaries, nor a complete right of way between the two cities. The relator argues that, inasmuch as the respondent cannot construct its proposed road until it procures these franchises and this right of way, it is not in a position to say that this power will be needed by it at all, and hence it ought not to be permitted to condemn his land until it is certain that the land will be needed.

On the question of the progress the respondent had made in this direction, the record disclosed that it had procured a right of way for its road over all the distance between the two cities except over a tract about eighty rods in width, and that for this it was negotiating with the owner, who was a resident of another county. It appeared, also, that it was then negotiating with each of the cities for franchises. That in each of them the terms of the franchise to be granted had been practically agreed upon, and that ordinances had been drawn and introduced granting to the respondent a franchise in accordance with those terms, which had passed to the second reading, and that in one of the cities it had deposited a considerable sum to be forfeited in case it did not carry out the conditions imposed by the franchise which might be granted it; in fact, it was admitted by the relator on the hearing that the respondent was proceeding diligently in its effort

to put itself in a position to commence at once the mechanical construction of its road.

It seems to us that the respondent had proceeded far enough to show that its immediate purpose was to apply the power it sought to create by the appropriation of the relator's property to a public use. This was its declared purpose, and its acts, in so far as it had actually proceeded, pointed to that end. Moreover, it is manifest that an enterprise of this character cannot be completed all at once. Being made up of several parts, it must be completed in parts. Why, then, should one part be deemed of more importance than another? Why may not the city as well say that it will not grant the franchise until the respondent has procured the power, as the court may say that it will not grant the right to procure the power until the franchise is granted? If the city did so say it, and the court should hold with the relator, it is plain that the enterprise has reached a point beyond which it cannot proceed. But we think there is no reason for such a holding. We think that, when it is made to appear that a promoter of an enterprise of this kind is proceeding diligently with it, and nothing is shown to have occurred that will prevent its ultimate accomplishment, that the court ought not to deny the right to acquire by condemnation an essential part merely because there is a possibility that the enterprise cannot be carried to completion. There is no danger that the property condemned will be applied to uses foreign to the purposes for which it is condemned. The property does not become the private property of the condemning corporation in the sense that it can appropriate it to uses of a private nature. It must use it for the purposes for which it condemns it, or else submit to its reversion at the suit of the state. *People v. Pittsburg R. Co.*, 53 Cal. 694; 2 Lewis, Eminent Domain, § 594, *et seq.*

The relator next contends that the respondent should not be permitted to exercise the right of eminent domain because its articles of incorporation show that some of the objects

for which it was incorporated are purely of a private nature, and that, to permit it to condemn property at all, is to permit private property to be taken for a private use. There are cases which maintain the doctrine that a statute authorizing the condemnation of property for uses a part of which, only, are of a public nature is in violation of the rule that private property cannot be taken for private use, and hence cannot be enforced (*Gaylord v. Sanitary District,* 204 Ill. 576, 68 N. E. 522, 98 Am. St. 235; *Ryerson v. Brown,* 35 Mich. 333, 24 Am. Rep. 564); and there are cases which deny the right to condemn when the avowed purpose, as set out in the petition, is to condemn for uses some of which are private. *Harding v. Goodlett,* 3 Yerg. 40, 24 Am. Dec. 546. But in this case the respondent asks in its petition to condemn for the public uses, only, recited in its articles of incorporation, making no mention of those which are purely private. If a private use is combined with a public one in such a way that the two cannot be separated, then, unquestionably, the right of eminent domain could not be invoked to aid the enterprise, but it has been said—and it seems to us that it is the better reason—that where the two are not so combined as to be inseparable, the good may be separated from the bad, and the right exercised for the uses that are public. *Lake Koen etc. Irr. Co. v. Klein,* 63 Kans. 484, 65 Pac. 684; *Brown v. Gerald* (Me.), 61 Atl. 785. In the first of these cases, the court said:

"We see no greater reason for denying to a private corporation the power of eminent domain for the promotion of a public use, because by its charter it is also authorized to engage in a private enterprise, than to deny to a private person the same power because he is inherently endowed with the same authority."

Furthermore, it was held in the case of *In re Niagara Falls etc. R. Co.,* 108 N. Y. 375, 15 N. E. 429, that in determining the question of public use, "the courts are not confined to, and it is not to be tested exclusively by the descrip-

tion of those objects and purposes as set forth in the articles of association, but evidence *aliunde,* showing the actual business proposed to be conducted, may be considered." And this being true, we think it must be true, also, that when a corporation, whose articles disclose purposes some of which are public and some of which are not, seeks to exercise the right of eminent domain, we may look to its application and the evidence introduced at the hearing to determine what its real purposes are.

Measured by these tests, there can be no question as to the purposes of the respondent corporation; for both its application and the testimony show that it desires this power that it may further its business as a common carrier. But while the exercise of this right of eminent domain must be guarded jealousy, so that the private property of one person may not be taken for the private use of another, after all is said and done, the power to prevent property taken for a public use from being subsequently diverted to a private use must rest rather in the supervisory control of the state than in caution in permitting the exercise of the power. Property taken for a public use by a corporation organized solely to promote a public business may be as easily diverted by it to a private use as it may by one having both public and private objects. It is not the object for which a corporation is formed that prevents it from wrongdoing. The preventive rests in the power of the state to compel it to lawfully exercise its granted privileges.

It is next said that there is no proof that the necessities of the respondent require the use of all of the property it proposes to take. It is true that the evidence does not give the estimated horse-power required to operate the respondent's proposed public facilities, nor does it give an estimate of the horse-power it is proposed to develop, but the president of the company, while testifying, stated generally that all that could be developed by the dam proposed would be required, and that if the company could get along with less it would

be satisfied to take less. Inasmuch as there was no evidence offered to controvert this statement, we think it sufficient to justify the finding that no more is proposed to be taken than the necessities require.

Finally it is said that nothing but land adjacent to the right of way may be taken for the use of a railway company, and that the lands in question here are not adjacent to the railway the respondent proposes to construct. Under the earlier statutes relating to eminent domain, there would be much in this contention, but the several subsequent statutes conferring the power of eminent domain on electric railway companies provide that they shall have the right to appropriate lands for a right of way and "other corporate purposes," without limitation as to the locality. See Laws 1903, p. 366. It seems to us that this is broad enough to permit the condemnation of land for power purposes however distant it may be from the proposed railway.

Contrary to the statement of the relator that the public have no interest in the cost of the power the respondent uses to operate its railway, we think the public have a vital interest in that cost. The public is interested in cheap transportation, and since the use of the facilities nature has afforded will help acquire cheap transportation, the law should be construed rather to enable their use than to permit them to waste in idleness. The principle is distinguishable from the principle of the cases holding that a station for a power house or coal beds cannot be condemned. In this case there is no other source from which power can be derived without an expense which is prohibitive of the enterprise, while in the other cases the situation was wanted because of its convenience, not because of necessity.

The order of the trial court will stand.

MOUNT, C. J., CROW, ROOT, HADLEY, RUDKIN, and DUNBAR, JJ., concur.

[No. 6191. Decided May 22, 1906.]

JAMES F. CONNER, *Appellant*, v. JAMES M. CLAPP *et al.*, *Respondents*.[1]

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—OPTIONAL AGREEMENT. Specific performance of a bond for a deed, or optional agreement to sell land, may be decreed where adequate consideration for the bond is shown by part payments, possession and the making of permanent improvements.

SAME—MUTUALITY. Specific performance of a bond for a deed will not be denied the purchaser for lack of mutuality because he did not sign the bond, which was optional in form and did not compel him to take the property.

VENDOR AND PURCHASER—SURRENDER OF BOND FOR DEED—EVIDENCE—SUFFICIENCY. A bond for a deed of property purchased is not shown to have been cancelled and surrendered, where it appears that the statement of such a surrender was made to the attorney of a mortgagee solely in order to secure the loan, and the vendor immediately afterwards offered to return the bond to the purchaser, who had made part payments and valuable improvements, and remained in possession, and the vendor treated the same as in force, making the demand for overdue payments and taking no steps to perfect the bond.

SAME—SPECIFIC PERFORMANCE—INCREASE IN VALUE OF LAND. An increase in the value of lands sold under a bond for a deed or optional sale is not a valid reason for denying a specific performance on the part of the vendor.

SAME—TENDER—AMOUNT DUE—EVIDENCE—SUFFICIENCY. The tender of $5,500 as the amount due on a bond for a deed calling for $6,500 is sufficient where it appears that in fact $5,500 was the amount to be paid as the consideration for the property.

SAME—FORM OF DEED IN DECREEING SPECIFIC PERFORMANCE. Upon decreeing specific performance of a bond for a deed of lands subject to a mortgage, *held* that the purchaser was entitled only to a deed of special warranty against the acts of the vendors.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered December 18, 1905, after a trial on the merits before the court without a jury, dismissing an action for specific performance. Reversed.

[1]Reported in 85 Pac. 342.

Agnew & Israel, S. M. Heath, and *C. W. Hodgdon,* for appellant.

J. B. Bridges and *Ben Sheeks,* for respondents.

RUDKIN, J.—This case was before this court on a former appeal. *Conner v. Clapp,* 37 Wash. 299, 79 Pac. 929. In addition to the statement of the case contained in the opinion then filed, we deem it sufficient to say that the plaintiff, by his amended complaint, seeks the specific performance of the bond for a deed there referred to. It is admitted by the pleadings, established by the proofs, and was found by the court on the former trial, that the bond for a deed was executed and delivered; that the plaintiff is in possession of the property; that he paid $2,000 of the purchase price on and prior to the delivery of the bond; and that he has made permanent and lasting improvements on the land of the value of $3,500, in addition to the payment of considerable sums as taxes, assessments, and for insurance. After the case was remanded, the pleadings were amended and the case was submitted to the court on the testimony taken at the former trial. The court stated that it could consistently reach no other conclusion than that announced on the former trial, and dismissed the action. From the judgment of dismissal, this appeal is prosecuted.

We will now briefly consider the various objections urged by the respondents against the specific performance of the contract. It is first contended that the bond was a mere option, and that specific performance will not be decreed. Conceding, for the purpose of this case, that the bond was a mere option, the conclusion contended for by the respondents does not necessarily follow.

"The giver of the option has often sought, and sometimes successfully, to resist performance by urging that, as the party holding the option was not compellable to exercise it affirmatively, it would be inequitable to require performance by the other. In a majority of the more recent cases the courts have recognized the plea only to overrule and disallow

it. It is now clearly recognized law that specific performance will not be refused on such grounds. 'An optional agreement to convey or renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity if it is made upon proper consideration, or forms part of the lease or other contract between the parties that may be the true consideration for it.'" 21 Am. & Eng. Ency. Law (2d ed.), 928.

From what has been said, it sufficiently appears that the bond in suit was supported by an adequate consideration, and this brings the case within the rule just stated. *Lawrence v. Pederson,* 34 Wash. 1, 74 Pac. 1011, cited by the respondents, is not in point. In that case it was held that a mining broker did not comply with his contract to procure a purchaser by simply procuring a person who took an option on the property. The right of the holder of the option to enforce specific performance was not there involved or considered. This objection rests substantially on the same basis as the next, viz., that specific performance will not be decreed because the appellant did not sign the bond and was not bound thereby, and because specific performance could not be decreed against him. This question was fully considered by this court in the recent case of *Western Timber Co. v. Kalama River Lumber Co., ante* p. 620, 85 Pac. 338, and was decided adversely to the respondents.

The next contention is that the bond was surrendered and cancelled by the voluntary act of the parties. At the time of the conveyance of the property to respondents, it was subject to a mortgage in the sum of $3,500, which was afterwards reduced to $2,500. In the latter part of December, 1901, and the early part of January, 1902, the respondents were negotiating for a loan on the property in the sum of $2,500 to take up this mortgage. The mortgagee insisted that the new mortgage should have priority over the bond for a deed, and that the appellant should join in the mortgage or surrender his bond. With the view of effecting this object, the appellant and the respondent J. M. Clapp went together

to the office of the attorney for the mortgagee, the appellant turned the bond over to the respondent Clapp, and stated that the bond had been surrendered and that they had made other arrangements. It is not seriously contended that any other arrangements were in fact made at that time, at least the respondents do not indicate what they were. The appellant contends that this was done solely for the purpose of satisfying the attorney for the mortgagee, and we think this contention must prevail, as any other view of the case is utterly inconsistent with the subsequent conduct of the parties. Thus, after this alleged surrender, the appellant wrote the respondent in regard to other improvements he was about to make on the premises, to which no objcetion was apparently made. On July 1, 1902, six months after the alleged surrender, the respondent J. M. Clapp wrote the appellant that the interest was forty-five days overdue, and that if a settlement in full was not made by August 1, other arrangements would have to be made. These facts are wholly inconsistent with the claim that the bond had been surrendered several months before. Indeed, the respondent J. M. Clapp testified that after he and the appellant left the office of the attorney for the mortgagee, he offered to return the bond to the appellant, but the appellant refused to accept the same, stating that he had no further use for it.

Aside from the alleged surrender, it is not claimed that the respondents took any steps to forfeit the bond by suit, tender of a deed, or otherwise. *Stein v. Waddell,* 37 Wash. 634, 80 Pac. 184. As stated by the respondents in their brief: "The record in this case shows some loose and unbusinesslike transactions between the parties," and in view of such conduct and the payment of a considerable portion of the purchase price, and the making of large expenditures upon the property, we think that equity and good conscience demand that specific performance should be decreed. We were of this opinion on the former appeal, but inasmuch as the respondents might desire to offer further testimony on the issue of

specific performance which they did not deem material on the issue then before the court, we refrained from directing a final judgment or expressing any opinion on the merits.

The respondents complain that the property has increased in value, and that the appellant is only seeking to take advantage of such increase. Undoubtedly this circumstance is a source of much litigation; but we might well ask, are not the respondents prompted by the same motive in their defense? Had the value of this property decreased below the amount due on the bond for a deed, would the respondents be now resisting specific performance?

Finally it is contended that the tender was insufficient. It is claimed that the bond called for $6,500 and interest, whereas the appellant tendered only $5,500 and interest. It is clearly shown by the proof that the amount to be paid was in fact $5,500. The respondents contend that this proof was incompetent, and that it went in over their objection. However this may be, the objection could not reach the testimony of the respondents themselves, which clearly and unequivocally shows that the consideration was in fact $5,500. On consideration of the entire record, we are satisfied that the appellant was entitled to the relief demanded.

At the time of the former trial, there was a mortgage on the property, but this mortgage has since matured and, if not already paid, the court below can make provision for its payment. As to the form of the deed, the appellant is only entitled to a deed of special warranty against the acts of the respondents and those claiming under them.

The judgment is reversed and the case remanded, with directions to the court below to ascertain the amount due the respondents under their bond, to which sum will be added any amounts the respondents may have paid by way of taxes, assessments, or for insurance on the property in controversy. Upon the payment of such sums, the court will enter a decree of specific performance. If the court finds that the appellant has made a good and sufficient tender of the amount due, and

that such tender has been kept good, no interest will be allowed after the date of the tender. Otherwise interest will be allowed to the date of the judgment.

MOUNT, C. J., FULLERTON, HADLEY, DUNBAR, ROOT, and CROW, JJ., concur.

[No. 6183. Decided June 5, 1906.]

LEVIN CARLSON *et al., Appellants*, v. J. C. CURRAN *et al., Respondents.*[1]

LANDLORD AND TENANT—EXISTENCE OF RELATION—EFFECT OF JUDGMENTS IN EJECTMENT—ESTOPPEL. The existence of the relation of landlord and tenant is not established where the complaint in ejectment suits, brought by the holders of a tax deed, against tenants of the former owner, did not recognize the relation of landlord and tenant and the answer denied such relation, although such suits were erroneously dismissed for want of sufficient notice to pay rent or surrender the premises; and the tenants are not estopped, in a subsequent action of unlawful detainer, to deny that they were tenants of the holders of the tax deed; nor does an unaccepted offer to pay rent establish the relation.

JUDGMENTS — RES ADJUDICATA — MATTERS NOT CONCLUDED. An adjudication that tenants of a former owner are entitled to a notice or demand before suit in ejectment by the holders of a tax title, is not an adjudication that the relation of landlord and tenant existed between the parties.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered December 9, 1905, upon findings in favor of the defendants after a trial on the merits before the court without a jury, dismissing an action of forcible entry and detainer. Affirmed.

Boyle & Warburton, for appellants.

J. W. A. Nichols and *T. W. Hammond,* for respondents.

RUDKIN, J.—On the first day of December, 1890, Charles Meuhlenbruch and wife were the owners of the premises in

[1]Reported in 85 Pac. 627.

controversy in this action, and on that date leased a portion thereof to the defendant, J. C. Curran for the purpose of erecting certain buildings thereon, which the lessee was authorized to remove on the expiration or termination of the lease. On the 31st day of August, 1901, the plaintiff Inga Carlson obtained a tax deed for the premises from the county treasurer of Pierce county, and on the same day served a written notice on the defendant J. C. Curran to the effect that she was the owner of the premises, and that after the first day of September, 1901, the rental for the use of the premises must be paid to her in advance. Some time after this the plaintiffs brought an action of ejectment against the defendants to recover possession of the premises and for damages. The complaint was in the usual form in such cases.

The answer was a general denial, accompanied by an affirmative defense that the defendants were in possession under the lease from the Meuhlenbruchs, and that they had paid the Meuhlenbruchs or their agents the rental agreed upon, except the sum of $4 due September 1, 1901, which sum they had tendered and were ready and willing to pay. To whom this tender was made does not appear, but it was presumably to the plaintiffs as no reason is suggested why the Meuhlenbruchs should refuse to accept it. A judgment of dismissal in this action was rendered on December 16, 1901, but for some reason the judgment was not signed or entered until February 4, 1903.

Soon after this the plaintiffs commenced a second action in ejectment against the same defendants to recover the same premises. The complaint in the second action differed from the complaint in the first action only in the fact that the plaintiffs set forth the source of their title and pleaded facts tending to show that the title to the buildings claimed and occupied by the defendants passed to the plaintiffs by virtue of the tax deed. The prayer of the complaint was that the plaintiffs be decreed the owners of the property together with the improvements thereon, and that they have judgment for

possession and for damages. The answer in the second case was in effect a denial of the allegations of the complaint, accompanied by substantially the same affirmative defense as in the former action, and a plea of *res adjudicata* by reason of the former judgment. The court sustained the plea of *res adjudicata* and on the 29th day of June, 1903, entered a judgment of dismissal.

On the 30th day of October, 1905, the present action was brought under the forcible entry and detainer statute. The complaint set forth the title of the plaintiffs, the lease from the Meuhlenbruchs to the defendants, the issuance of the delinquency certificate, the tax foreclosure and sale, and the tax deed to the plaintiffs, the former ejectment proceedings, the answer of the defendants therein and their testimony given on the trial thereof, the service of a notice to pay rent or surrender possession, and a refusal to comply therewith. It is unnecessary to set forth in detail the allegations of the answer. The action was tried by the court without a jury, the court found that the relation of landlord and tenant did not exist between the parties and entered a judgment of dismissal. From this judgment the plaintiffs have appealed.

The appellants concede that the judgment must be affirmed, unless the relation of landlord and tenant existed between the parties, and this presents the only question for our consideration. The relation of landlord and tenant did not arise by reason of the tax sale, as the appellants acquired their title, if any, from an independent source, and took the property free from any contracts or obligations of the former owners. The appellants have contended throughout this litigation that the lease by the former owners did not concern them and that they were not bound thereby. This contention is, no doubt, sound in law, and the appellants do not take any different position on this appeal, but they earnestly insist that the respondents are estopped to deny that the relation of landlord and tenant does in fact exist by reason of the

issues tendered, the testimony given, and the judgments rendered in the ejectment suits.

From a careful examination of the record, which is very brief, we fail to see wherein the respondents have taken inconsistent positions in the course of this protracted litigation, or why they should now be estopped to deny that they are tenants of the appellants. In their answer to the complaint in the first ejectment suit they set forth the relation existing between themselves and the former owners, their payment of rent to the former owners, except the sum of $4 and their readiness to pay the balance. There was no intimation in the answer that they were tenants of the holder of the tax title by contract, by operation of law or otherwise. In fact they denied her title and claim to the property *in toto*. Nor did the offer to pay rent create the relation. The offer was never accepted, and under the circumstances must be construed as an offer to pay whomsoever the court should adjudge entitled thereto. The complaint in the first action did not recognize the relationship of landlord and tenant, and the complaint in the second action repudiated any such relationship by averring that the respondents offered to pay $4 per month rental while the appellants insisted upon the payment of $10. There was therefore nothing in the pleadings or testimony to show or even intimate that the relation of landlord and tenant existed between the respondents and the appellants here or was relied upon as a defense.

The appellants contend, however, that the court dismissed the first ejectment suit because the statutory notice required by law in actions between landlord and tenant was not given. There were no findings of fact and the order of dismissal was general in its terms, assigning no reason therefor. This action was tried about four years after the first ejectment suit and the attorneys for the parties differ as to the reasons assigned by the court for its decision. According to the recollection of the attorney for the plaintiffs, on the first trial the court ruled that the owners of the buildings were not made parties

to the tax foreclosure, that the title to the buildings did not pass by the tax deed, and that the defendants were entitled to notice to quit before an action could be maintained against them. What kind of a notice the attorney does not state and perhaps the court itself did not indicate. According to the recollection of the attorney for the defendants, on the other hand, the action was dismissed because no demand for restitution was made before suit. Counsel differ therefore only as to the form of the demand or notice which the court deemed necessary. The appellants' counsel now contend that the demand referred to by the court was a written notice required in actions between landlord and tenant, whereas counsel for respondents contend that it was a simple demand for possession.

We do not consider this difference of opinion between the attorneys material, as neither view would sustain the appellants' contention. As we have stated there was not even a suggestion in the record that the relation of landlord and tenant existed between the appellants and respondents, and the only reasonable view we can take of the court's conclusion is that it was of opinion that inasmuch as the original possession of respondents was lawful a demand for restitution must precede a suit against them. But whatever the view of the court may have been, its conclusion that the respondents were entitled to a notice or demand of some kind before suit fell far short of an adjudication that the relation of landlord and tenant existed between the parties. Nor would the offer to pay rent establish the relationship. The offer was never accepted, and as stated above, we do not think it could properly be construed as anything more than an offer to pay the appellants, should the court adjudge them entitled thereto.

The respondents on the other hand contend that whatever may have been the view of the court on the trial of the first ejectment suit, or the reasons given for the judgment of dismissal, the second judgment establishes the fact for all time that the former judgment was final and conclusive as between

the parties. The appellants contend that the second judgment decided that the first judgment was final to the extent that no action would lie until after notice was given, but nothing more. Inasmuch as the title to the property is not involved and cannot be tried in this action, we will not determine the force or effect of either of these judgments further than to hold that they did not establish the relation of landlord and tenant between the parties now before the court. The appellants have made three unsuccessful attempts to establish their right to the property in controversy and each time have failed of a hearing on the merits. For this reason we have endeavored to find some way to afford them relief consistent with the established rules of law. But while the first judgment against them was clearly erroneous, as the relation of landlord and tenant did not exist, and no notice or demand is necessary in such cases before suit (*Lewiston Water & Power Co. v. Brown, ante* p. 555, 85 Pac. 47), and while the second judgment was erroneous, if it determined anything beyond the fact that the first judgment was *res adjudicata* until notice was given or a demand made, yet these judgments are not before us for review, and we are constrained to hold that the judgment appealed from is free from error, and the same is affirmed.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 6092. Decided June 5, 1906.]

W. A. RITCHIE, *Respondent*, v. THE STATE OF WASHINGTON, *Appellant*.[1]

STATES—CONTRACTS—AUTHORITY OF ATTORNEY GENERAL. Under Laws 1895, p. 58, §§ 1-3, making it unlawful for any state officer to create a deficiency or incur a liability in any sum greater than is appropriated, and Laws 1901, p. 122, limiting the amount of the attorney general's expenses in defending suits against the state, the attorney general has no authority to employ an architect as an expert necessary to the defense of an action creating a liability in excess of such limit.

SAME—IMPLIED POWER TO CONTRACT. Laws 1895, p. 188, making it the duty of the attorney general to appear and defend all suits brought against the state, does not give him implied authority to employ an expert to assist him, when the public interests require it.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered October 6, 1905, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury in an action on contract. Reversed.

The Attorney General and *A. J. Falknor, Assistant*, for appellant.

Vance & Mitchell, for respondent.

RUDKIN, J.—In the year 1902 the F. H. Goss Construction Company, contractor for the construction of the annex to the state capitol building, brought an action against the state in the superior court of Thurston county for the recovery of approximately $25,000 for making alterations and furnishing extras in the construction work, not called for by the original contract. The action involved the construction or interpretation of the original plans, specifications, and drawings, and the true intent and meaning thereof. The then attorney general employed the plaintiff, who was the supervising architect for the building, as an expert, to assist him in preparing his

[1]Reported in 85 Pac. 417.

defense and defending the action on the trial. The present action was brought against the state to recover the value of the services performed under this employment, and the expenses necessarily incurred in their performance. The court below found in favor of the plaintiff in the sum of $1,550 for services, and $629.20 for expenses, and entered judgment against the state for the aggregate of these amounts. From this judgment, the defendant appeals.

The appellant does not question the correctness of the court's findings as to the value of the services or the amount of the expenses, in this court, but rests its defense solely upon the ground that it is under no legal obligation to pay the same, and that is the only question here for our consideration. Sections 1 and 2 of the act of March 7, 1895, Laws 1895, p. 58, provide as follows:

"Sec. 1. That it shall be unlawful for any of the state officers or trustees, managers, directors, superintendents or boards of commissioners of any of the public institutions of the state of Washington, or for the officers of any of the departments of the state of Washington, to create a deficiency, incur liability, or to expend a greater sum of money than is appropriated by the legislature for the use of said public institution or department.

"Sec. 2. Any officer, trustee, manager, director, superintendent or commissioner, enumerated in section one of this act, who shall violate the provisions of this act by creating a deficiency, incurring a liability, or expending a greater sum than is appropriated by the legislature for any public institution or department of this state in any one year, shall be individually liable for the same, and shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one thousand dollars."

Section 3 gives a right of action to the "person, co-partnership or corporation with whom a liability is attempted to be incurred or debt contracted," against the officer and his official bondsmen for the full amount of the liability incurred or debt contracted, and § 4 provides for certain emergencies, but does not include the attorney general or his office. The

legislature of 1901 made the following appropriation for the attorney general's office: "Court expenses, advanced per diem and mileage for witnesses before courts and land department, $300." Laws 1901, p. 122. We might state here that the respondent does not seek to recover out of, or by reason of, this appropriation. The appellant contends that the contract of employment relied on by the respondent is illegal, or at least without authority of law, by reason of the foregoing statutory provisions and that no recovery can be had.

The respondent on the other hand contends, that by art. 3, § 21, of the constitution the attorney general is made the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law; that by section 3 of the act of March 20, 1895 (Laws 1895, p. 188), the attorney general or his assistant must appear and act as counsel for the state in all actions brought against it, and that by virtue of these provisions the attorney general has implied authority to employ an expert to assist him in the defense of any such action whenever the public interests demand it. With this latter contention we are unable to agree. A court is treading upon dangerous ground when it rests the authority of a public officer to bind the state on some unforseen emergency or the law of necessity. The legislature has in effect said to the attorney general "You must appear as counsel in all actions brought against the state; you are allowed $300 to defray the expenses of all such actions for the period of two years, and if you create a deficiency or incur a liability beyond this you are personally liable and subject to criminal prosecution." It is very difficult to find room for implied power in all this. The respondent cites *Brown v. Travelers' Life etc. Ins. Co.*, 26 App. Div. 544, 50 N. Y. Supp. 729, but that was an action between private parties and there was no limitation on the authority of the attorney. Had the authority of the attorney been limited in that case as in this, and had the expert undertaken the performance of his contract with full

knowledge of such limitation, it would scarcely be contended that a recovery could be had beyond the limit imposed, for it is elementary that an agent can only bind his principal while acting within the scope of his authority, and that a person dealing with a public officer is bound to know the limit of his powers.

Counsel's chief reliance is on the case of *Rauch v. Chapman,* 16 Wash. 568, 48 Pac. 253, 58 Am. St. 52, 36 L. R. A. 407. It was held in that case "that the constitutional limitation of county indebtedness in § 6 of article 8 of our constitution, does not include those necessary expenditures made mandatory in the constitution and provided for by the legislature of the state, and imposed upon the county; . . ." We fail to see the applicability of that case to the facts before us. Certain positive duties are imposed on counties by the constitution and laws of the state, but no duty was imposed on the attorney general to employ the respondent in this case. The law enjoined upon him the duty to appear in the action and defend the interests of the state to the best of his ability, with the means which the legislature had placed at his command, but nothing more. If the interests of the state should suffer because the legislature unduly curtailed the power of its representative, the responsibility for the miscarriage of justice would rest with the legislature and not with the attorney general or the courts. The policy of permitting the state to be sued generally, and allowing the attorney general but $300 to defray the expenses for a period of two years may be unwise, but the policy of such a law and such a limitation on the authority of the attorney general is for the legislature and not for the courts.

This case cannot be distinguished in principle from *Young v. State,* 19 Wash. 634, 54 Pac. 36. There the governor employed the plaintiff to examine, expert and report upon the books and accounts, vouchers, and the condition of affairs generally, with reference to the financial management of the state penitentiary during the term of Warden Coblentz, who

had committed suicide. The plaintiff complied with his contract of employment and brought an action against the state to recover the value of his services. This court adhered to the well-settled rule "that public officers have, and can exercise, only such power as is conferred upon them by law, either statutory or constitutional, and that the government is not bound by the unauthorized acts of its officers or agents," and held that there could be no recovery. This, too, was prior to the passage of the act of 1895 above cited. The employment in that case as in this was, no doubt, in the interest of the state, and there was perhaps as much reason to imply power in the one case as in the other.

Conceding, for the purpose of the argument only, that contingencies may arise where one of the officers of the executive department of the state will be authorized to incur a liability against the state in the absence of legislative authority and the absence of an appropriation for the purpose, we are convinced that no such case is presented here. The equitable character of the respondent's claim has been established by the judgment of the court below, and the legislature may provide for its payment, but the claim lacks legal sanction and we cannot affirm the judgment. While the fact is immaterial, in deference to the former attorney general, we will say that he fully advised the respondent of the situation confronting him and did not attempt to create a deficiency or incur a liability against the state.

The judgment is reversed, with directions to dismiss the action.

MOUNT, C. J., FULLERTON, HADLEY, and DUNBAR, JJ., concur.

[No. 6049. Decided June 9, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Thomas Rock et al., Appellant,* v. OTTO A. CASE, *as County Clerk etc., Respondent.*[1]

MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENTS — APPEARANCE FEE OF OBJECTORS. Upon a special assessment against property benefited by the opening of a street, objectors to an assessment levied by commissioners appointed by the superior court, may be required on filing joint objections, to pay the clerk of the court an appearance fee of two dollars, but only one such fee can be demanded where the objectors appear by one attorney and unite in their objections.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 8, 1905, after sustaining a demurrer to the application, dismissing an action for a writ of mandamus to compel the clerk of the superior court, without separate appearance fees, to file joint objections of several defendants in a special assessment proceeding. Reversed.

Austin E. Griffiths, for appellant.

Kenneth Mackintosh and *R. W. Prigmore,* for respondent.

DUNBAR, J.—Commissioners were appointed by the lower court to assess property benefited, to pay for the damages and compensation awarded in the opening of a street. Assessment rolls were prepared and notices were issued designating a time for hearing and requiring parties interested who so desired to appear and defend. The relators, eleven in number, joined together on one common answer or set of objections to the assessments made upon their properties, and engaged one of their number to act as their attorney, and jointly tendered to respondent, as clerk of the superior court of King county, their common answer, and asked that the same be received and filed as the only appearance, answer, and objections

[1]Reported in 85 Pac. 420.

of relators, and at the same time tendered a filing fee in the sum of $2, which fee the clerk refused to receive, and refused to file said objections, upon the ground that each of the eleven objectors should pay a separate appearance fee of $2. With this demand the relators refused to comply, and thereupon applied to the superior court for a writ of mandamus to compel the clerk to receive and file these objections, either without or with the payment of the sum of $2 as a filing fee. A demurrer was sustained to this application and the cause dismissed. Thereupon this appeal was taken.

Two points are urged by the appellant, first, that no filing fee at all is required as a condition precedent to the filing of these objections; second, that in any case where the objectors do not appear separately, but employ the same attorney and unite in their objections, not more than two dollars should be charged. The first proposition was in principle decided adversely to appellant's contention in *State ex rel. Clark v. Neterer,* 33 Wash. 535, 74 Pac. 668; but on the second proposition we are of the opinion that the court erred, and that, where the objectors appear by the same attorney and unite in their objections, separate fees should not be exacted. This seems to us to be in harmony with the other statutes relating to costs, and especially with § 1610 of the fee bill found in Bal. Code, p. 393, which provides that the "defendant . . . or other adverse or intervening parties appearing separately from the others, shall pay, when his or their appearance is entered in the cause, . . . a fee of $2.00." In this case but one fee is required so far as the plaintiff is concerned, and if the defendants see fit to unite their cause, presumably for the purpose of economy in the matter of costs, there seems to be no good reason for exacting separate fees. In addition to this, this question was practically decided in favor of appellant's contention in *In re Seattle,* a recent decision of this court reported in 40 Wash. 450, 82 Pac. 740, and while that case involved a question of cost

on appeal, we are unable to distinguish it in principle from the case at bar.

The judgment is reversed and the cause remanded, with instructions to the lower court to receive and file the objections upon the payment of the sum of $2 as a filing fee.

MOUNT, C. J., ROOT, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 6134. Decided June 9, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Henry Harris et al., Plaintiff,* v. THE SUPERIOR COURT FOR THURSTON COUNTY, *et al., Respondents.*[1]

EMINENT DOMAIN—PUBLIC USE—ELECTRIC POWER FOR STREET RAILWAY AND PUBLIC LIGHTING IN CONNECTION WITH COMMERCIAL SALE. A light and power company operating a street railway system and public lighting plant, is not entitled to exercise the right of eminent domain to secure electric power to sell to the public, generally and without discrimination, in addition to its electric light and street railway system, since such use is not a public use.

Certiorari to review an order of the superior court for Thurston county, Linn, J., entered March 22, 1906, in favor of the petitioner, adjudging a public use and directing the assessment of damages by a jury in a condemnation proceeding. Reversed.

James M. Ashton and *Vance & Mitchell,* for relators, contended, among other things, that if a private use is combined with a public use in such a way that the two cannot be separated, the whole act of taking is invalid. Lewis, Eminent Domain, § 206; *Attorney General v. Eau Claire,* 37 Wis. 400; *Sadler v. Langham,* 34 Ala. 311. Under the circumstances existing here, the company has no right to condemn the property. *State ex rel. Tacoma Ind. Co. v. White River*

[1]Reported in 85 Pac. 666.

Power Co., 39 Wash. 648, 82 Pac. 150; *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681; *Avery v. Vermont Elec. Co.*, 75 Vt. 235, 54 Atl. 179, 98 Am. St. 818, 59 L. R. A. 817; *In re Rhode Island etc. R. Co.*, 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879; *State ex rel. Attorney General v. Superior Court*, 36 Wash. 381, 78 Pac. 1011; *Matter of Water Com'rs of Amsterdam*, 96 N. Y. 351; *Pittsburg etc. R. Co. v. Benwood Iron-Works*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680; *Miami Coal Co. v. Wigton*, 19 Ohio St. 560.

T. N. Allen and *Troy & Falknor*, for respondent, among other things, to the point of the statutory right of eminent domain, cited: Laws 1903, pp. 362, 366; *State ex rel. Tacoma Ind. Co. v. White River Power Co.*, 39 Wash. 648, 82 Pac. 150. Necessity is a legislative question. 1 Lewis, Eminent Domain (2d ed.), §§ 162, 237, 238; *Charleston Natural Gas Co. v. Lowe*, 52 W. Va. 662, 44 S. E. 410; *Bloodgood v. Mohawk etc. R. Co.*, 18 Wend. 13; *Gilmer v. Lime Point*, 18 Cal. 229, 252; *Moseley v. York Shore Water Co.*, 94 Me. 83, 46 Atl. 809; *Concord R. Co. v. Greely*, 17 N. H. 47; *Petition of Mt. Washington Road Co.*, 35 N. H. 134; *Talbot v. Hudson*, 16 Gray 417; 18 Cen. Digest, Eminent Domain, §§ 147-160. The respondent company will subserve a public use, and has the right of eminent domain, in (1) operating an electric railway: *People v. Kerr*, 27 N. Y. 188; *Id.* 20 How. Prac. 130; *Id.* 25 How. Prac. 258; *Id.* 37 Barb. 357; *Toledo Elec. St. R. Co. v. Toledo Consol. St. R. Co.*, 11 Ohio Dec. 365, 26 Weekly Law Bulletin 172; *Ogden City R. Co. v. Ogden City*, 7 Utah 207, 26 Pac. 288; 18 Century Digest, c. 812, § 66; *Aurora etc. R. Co. v. Harvey*, 178 Ill. 477, 53 N. E. 331; *Chicago etc. R. Co. v. Chicago etc. R. Co.*, 211 Ill. 352, 71 N. E. 1017; (2) furnishing electricity for lighting purposes. *Brown v. Gerald* (Me.), 61 Atl. 785; *Hollister v. State*, 9 Idaho 8, 71 Pac. 541; *Varner v. Martin*, 21 W. Va. 534; *Tacoma Ind. Co. v. White River Power Co., supra; Fork Ridge etc. Ass'n v. Redd*, 33 W. Va. 262, 10

S. E. 405; Lewis, Eminent Domain, §§ 165, 173; *Snell v. Clinton Elec. Light etc. Co.*, 196 Ill. 626, 63 N. E. 1082, 89 Am. St. 341, 58 L. R. A. 284; *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; *Cincinnati etc. R. Co. v. Bowling Green*, 57 Ohio St. 336, 49 N. E. 121; *Owensboro Gaslight Co. v. Hildebrand*, 19 Ky. Law 983, 42 S. W. 351; *Fallsburg Power etc. Co. v. Alexander*, 101 Va. 98, 43 S. E. 194, 99 Am. St. 855; *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; *Brass v. North Dakota ex rel. Stoeser*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757; (3) supplying electric heat and power: *Rockingham County Light etc. Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; *Opinion of Justices*, 182 Mass. 605, 66 N. E. 25; *Id.*, 150 Mass. 592, 24 N. E. 1084, 8 L. R. A. 487; *Lumbard v. Stearns*, 4 Cush. 60; *State etc. Co. v. American etc. News Co.*, 43 N. J. L. 381; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; 17 Am. & Eng. Ency. Law (2d ed.), 909. See, also, *Denver Power etc. Co. v. Denver etc. R. Co.*, 30 Colo. 204, 69 Pac. 568; *Hazen v. Essex Co.*, 12 Cush. 475; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 695, 23 Am. Dec. 756. A private use incidentally included will not defeat the right to condemn for public purposes. 10 Am. & Eng. Ency. Law (2d ed.), 1065; Cooley, Constitutional Law (5th ed.), p. 674; *Lake Koen etc. Irr. Co. v. Klein*, 63 Kan. 484, 65 Pac. 684; *Bridal Veil Lum. Co. v. Johnson*, 30 Ore. 205, 46 Pac. 790, 60 Am. St. 818; *In re Niagara Falls etc. R. Co.*, 108 N. Y. 375, 15 N. E. 429; *Berrien Springs Water Power Co. v. Berrien Circuit Judge*, 133 Mich. 48, 94 N. W. 379, 103 Am. St. 438; *Ryerson v. Brown*, 35 Mich. 332, 24 Am. Rep. 564; *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114; *Toledo etc. R. Co. v. East Saginaw etc. R. Co.*, 72 Mich. 227, 40 N. W. 436; *South Chicago R. Co. v. Dix*, 109 Ill. 237, 243. If the land is necessary to the carrying out of the

purposes of the corporation it is within the purview of the condemnation statute, whether adjacent or not. 1 Lewis, Eminent Domain, § 170; *Rockingham County Light etc. Co. v. Hobbs, supra; Prescott Irr. Co. v. Flathers,* 20 Wash. 454, 55 Pac. 635; *Bell v. Lamborn,* 18 Colo. 346, 20 L. R. A. 241. A reasonable necessity is shown for all the land sought to be condemned. *Samish River Boom Co. v. Union Boom Co.,* 32 Wash. 586, 73 Pac. 670; *Mobile etc. R. Co. v. Alabama etc. R. Co.,* 87 Ala. 501, 6 South. 404; *Seattle etc. R. Co. v. Bellingham Bay etc. R. Co.,* and *Butte etc. R. Co. v. Montana etc. R. Co., supra; Postal Tel. Cable Co. v. Oregon Short Line R. Co.,* 23 Utah 474, 65 Pac. 735, 90 Am. St. 705; *New Central Coal Co. v. George's Creek Coal & Iron Co.,* 37 Md. 537; *Saginaw etc. R. Co. v. Bordner,* 108 Mich. 236, 66 N. W. 62; *Olmsted v. Proprietors of Morris Acqueduct,* 46 N. J. L. 495; 18 Century Digest, Eminent Domain, § 157; 10 Am. & Eng. Ency. Law (2d ed.), 157, 158, 1057.

DUNBAR, J.—Respondent, a domestic corporation, with its principal place of business at Olympia, filed its notice and petition in the superior court of Thurston county, Washington, for the condemnation and appropriation of certain real property situate in Thurston county, Washington, belonging to the relators. The respondent is a light and power company, and under certain charter provisions is empowered to furnish light to the cities of Olympia and Tumwater, and to run electric cars in and between the cities of Olympia and Tumwater for hire. The electricity which is used by the company is generated by water power from water which flows down the Des Chutes river. It is alleged in the petition that there is not sufficient water to furnish power for the company to carry out the provisions of its charter in furnishing electricity to the cities of Olympia and Tumwater, and in operating their electric cars, and for the purpose of furnishing such power as it has been furnishing at reasonable and uniform rates to the public generally.

The petition, among other things, is as follows: That your petitioner has not been, nor does it intend to engage in any other corporate purposes except as herein set out, except it admits it has been engaged in furnishing electric power at reasonable and uniform rates to the public generally and without discrimination between persons substantially similarly situated, and is bound to continue to so furnish electrical power to the general public at reasonable and uniform prices and without discrimination between persons substantially similarly situated. The testimony in the case is also to the effect that the condemnation is sought for the purpose of obtaining additional power, not only for use in operating the light plant and the electric car system, but for the purpose of selling power to the different manufactories, and for different purposes. So that the question presented is whether or not the furnishing of power outside of the power necessary to operate its electric cars and lighting system is a public use. This question was raised by the pleadings and the court found that such use was a public use, that the respondent had the right and power to condemn, that there was a necessity for the condemnation, and ordered the question of the compensation to be paid the relator to be submitted for the determination of a jury. This proceeding was brought to review that order.

The land sought to be condemned was land which would be overflowed by raising a dam in the Des Chutes river creating a reservoir for the purpose of storing the waters of the Des Chutes river and using the same in times of low water. We held in the *State ex rel. Harlan v. Centralia-Chehalis Elec. R. etc. Co., ante* p. 632, 85 Pac. 344, that the operation of an electric car was a public use, and the right of condemnation existed for the purpose of obtaining power necessary for the prosecution of such business. It is, also, we think, without question now admitted that the furnishing of electric lights to a municipality is a public use which warrants condemnation of private property. In the case last

mentioned it was said that, if a private use is combined with a public one in such a way that the two cannot be separated, then unquestionably the right of eminent domain could not be invoked to aid the enterprise. And many cases were cited to the effect that the statute authorizing the condemnation of property for uses a part of which only are of a public nature, is in violation of the rule that private property cannot be taken for private use, and hence cannot be enforced. And that the courts are not confined to, and it is not to be tested exclusively by, the description of those objects and purposes as set forth in the articles of association, but evidence *aliunde*, showing the actual business proposed to be conducted, may be considered. And in that case, where under the articles of incorporation the company was entitled to engage in private enterprises, it was held that, inasmuch as the application to condemn was made for a public use only—namely, to obtain power to prosecute the business of running electric cars—the right to condemn would not be withheld.

In this case it will be observed that, under both the application and the proof, the power of condemnation was sought for the purpose of obtaining power to furnish to other enterprises in addition to the charter uses of the respondent. And while this question was not directly decided in the case last referred to, it has been, it seems to us, directly decided adversely to respondent's contention by this court in *State ex rel. Tacoma Industrial Co. v. White River Power Co.*, 39 Wash 648, 82 Pac. 150, where it was held that the right of eminent domain cannot be exercised in favor of an electric light and power corporation organized for the purpose of diverting water for power purposes for the generation of electricity to be sold commercially to manufactories, railways, and cities, in the absence of statutory regulation and guarantees of the public use and enjoyment of the property; since the same is not a public service corporation, and the use is not a public use. In this case, of course, the respondent is only a public service corporation for the purpose of furnishing light and operating

cars as above mentioned; and evidently is not a public service corporation for the purpose of engaging in the business which the White River Power Company was engaged in, and in the exercise of which it was held not to be a public service corporation, and therefore it is seeking to take private property for a private use in violation of section 16, art. 1, of the state constitution.

In the *White River Power Co.* case, many decisions were cited to sustain the doctrine that such uses as we are discussing were not public uses, and it was there said that, "The question is not a new one in this court. It was fully considered, in relation to another statute, in the case of *Healy Lumber Co. v. Morris,* 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964;" and citations from Lewis, Eminent Domain, and many other cases were cited to sustain the doctrine announced in the *Healy Lumber Co.* case, in which case we decided that the public use authorizing the exercise of the right of eminent domain contemplated by the constitution is not synonymous with public benefit, and a use for private enterprises does not authorize the exercise of the right however much public policy demands it, or whatever the public benefit therefrom may be, but it must be a use by the public or by some agency that is *quasi* public. And the authorities *pro* and *con* on this question were set out at length in that case.

In view of the elaborate discussion and multifarious authorities cited in the two cases just mentioned, we do not deem it necessary to again go into a discussion of the question on its merits, but refer to those cases, and the case of *Brown v. Gerald* (Me.), 61 Atl. 785, an exhaustive and instructive case, where the authorities are marshaled and the conclusion reached that manufacturing, generating, selling, distributing and supplying electricity for power for manufacturing or mechanical purposes, is not a public use for which private property may be taken against the will of the owner; that a public use such as justifies the taking of private property against the will of the owner cannot rest

merely upon public benefit, or public interest, or great public utility. In the course of the opinion in that case, it was said:

"We think that the ultimate use of the power is an important consideration. If that use is essentially a private use, in a private business, will it become a public use by merely multiplying the number of persons who may have occasion to use the power? If it would not be a public use to supply power for one mill, would it be such to supply for two mills, or for six, or for twelve? We think not. In each individual case, it would be supplying the power for a private use. If the state cannot take the property of one and give the use of it to another for private use, can it give the use to that other, in order that in the form of electric power he may distribute the use to a dozen others for their private business purposes? We think not. There is no underlying necessity or peculiarity in the business of distributing electric power which requires any such enlargement of the power of eminent domain. There seems to be such a necessity in the cases of all the *quasi* public corporations which we have mentioned. Railroads and telegraph, telephone, and water companies cannot be built and maintained by individuals for their several use, each one for himself. There is an 'impossibility,' to use Judge Cooley's words, 'of making provisions for them otherwise' than through the power of eminent domain. But every man can, if he wishes, have a mechanical power of his own, either steam, or water, or electric. He can serve himself, without the intervention of the state. Not so conveniently or advantageously, perhaps, as it would be to be served by others. But mere convenience and advantage in private business must yield to the property rights of citizens sacredly guarded by the constitution."

It must be admitted that many things are considered a public use now that were not so considered a half or even a quarter of a century ago, and it may be, and it is probable, that in the not distant future many things which are now considered a private use, by the changing conditions and evolution of business, will of necessity become a public use, but until such change is made manifest private property must be protected from condemnation in that behalf.

The judgment of the lower court will be reversed, but the respondent if it desires may amend its complaint asking for condemnation of land sufficient for the purposes which we have indicated were of public use, and the proof must be confined to the necessity of such use.

MOUNT, C. J., ROOT, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 5996. Decided June 9, 1906.]

FEDERAL IRON AND BRASS BED COMPANY, *Respondent*, v. A. HOCK, *Appellant*.[1]

CONTRACTS—BREACH—PROSPECTIVE PROFITS. In an action upon notes given for credit extended under a contract whereby the plaintiff was to supply certain goods on credit, and the defendant agreed to sell the plaintiff's goods exclusively in a certain territory until a certain date, the defendant may plead a breach of the contract by plaintiff's refusal to deliver the goods, and may counterclaim for damages for his future profits under the contract, where he had expended money in opening a market for the goods.

PLEADINGS—SETTLEMENT OF—WAIVER OF ERROR BY GOING TO TRIAL. Error in striking out part of an answer and sustaining a demurrer thereto is not waived where the appellant did not plead over, but went to trial as the pleadings stood.

FRAUDS, STATUTE OF—PART PERFORMANCE. An oral contract to sell in a certain territory exclusively the goods of a certain manufacturer is taken out of the operation of the statute of frauds by part performance in expending money and working up a market for the sale of the goods.

CONTRACTS—CONSIDERATION AND MUTUALITY. A contract to supply goods on the one hand, and on the other hand to sell the same exclusively and work up a market for them, is not void for want of mutuality or consideration.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered July 18, 1905, upon the verdict of a jury rendered in favor of the plaintiff, in an action on promissory notes. Reversed.

[1]Reported in 85 Pac. 418.

Samuel F. McAnally and *Hastings & Stedman,* for appellant.

Charles L. Westcott, for respondent.

Root, J.—This appeal is from a judgment rendered in two suits which were consolidated for the purpose of trial, said actions being based upon promissory notes. The alleged facts involved are substantially as follows: The respondent, a manufacturer of iron beds in Illinois, having no representative or market for its goods in the northwest, entered into a contract with the appellant, a jobber and manufacturer's agent in Tacoma, about May 1st, 1903 (said contract covering the period to January 1, 1904, after which a new contract was to be made if mutually desirable), whereby appellant should sell only respondent's products and be sole agent therefor in the agreed territory. By reason of appellant's inability to operate otherwise, credit was to be given. Notes were to be executed for balances due for goods to be furnished at an agreed price until January 1, 1904. The appellant spent considerable money in handling respondent's goods, and opened up a market for the same, and paid a number of the notes as they became due. Then while appellant had on hand remnants of said stock which were unsaleable without similar goods of different prices and specifications to mix with them to fill orders, and having outstanding but not due three notes given under said agreement, the respondent, about September, 1903, at a time when appellant could not obtain goods elsewhere, refused to deliver to the latter any more goods.

The two actions were brought on the three notes when they became due, and the consolidated cases were tried by a jury. After the consolidation and before the trial, the court, on plaintiff's motion, struck from appellant's answer and counterclaim all reference to, or claims for, loss of profits in defendant's business, and subsequently sustained a demurrer to the

affirmative defense and counterclaim in the actions thus consolidated. The trial resulted in a judgment in favor of respondent, from which this appeal is taken.

The action of the trial court in striking the affirmative answer and counterclaim and in sustaining the demurrer is assigned as error, as is also the denying of appellant's motion for a new trial.

We think these rulings of the trial court were erroneous. It is doubtless true that prospective profits are ofttimes speculative, indefinite, and imaginary, but there is a reasonable certainty as to some future profits. There was nothing in the allegations of these answers stricken as aforesaid to indicate that they were all merely speculative and conjectural or of a character incapable of legal ascertainment. Ofttimes in the breach of a contract of this character, the only damages sustained are those of future profits. These may be of a substantial character in contemplation of law, and such as the injured party should be entitled to recover from the party who has without justification broken the contract. The recovery must, of course, be limited to the amount which from all the surrounding conditions may be deemed to have been reasonably certain had the breach not occurred. In the case of *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676, the court of appeals of New York said:

"Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and so far as they can be properly proved, they may form the measure of damage. As they are prospective they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it, and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach."

See, also, *Skagit R. & Lum. Co. v. Cole,* 2 Wash. 57, 25 Pac. 1077; *Shepard v. Milwaukee Gas Light Co.,* 15 Wis. 349; *Goldhammer v. Dyer,* 7 Colo. App. 29, 42 Pac. 177.

It is urged by respondent that the appellant waived any error the court may have made in striking part of the answer and sustaining a demurrer thereto, by going to trial upon the pleadings as thus modified. We do not think this contention should be upheld. After the order to strike had been made and the demurrer sustained, the appellant did not plead over but went to trial upon the pleadings as they then stood. We think it is better practice to permit a party to do this than to require him to hazard an immediate appeal which, if lost, would deprive him of a hearing on the merits, and if sustained would necessitate another trial in the lower court and probably another appeal here, thus resulting in the case being tried piecemeal.

It is also urged by respondent that the contract was oral and therefore void under the statute of frauds, and that it was also void for want of consideration and mutuality, there being no obligation on the part of the defendant to purchase any definite amount of the goods, but only the quantity he might desire. As to the first objection, it is answered by the fact that the contract was partially performed and thereby taken out of the operation of the statute. As to the second objection, we think neither consideration nor mutuality was wanting. Appellant was required to confine his sales to respondent's goods and to build up a market therefor; and respondent was to supply the goods. Each had other obligations, and good faith was enjoined upon each.

The judgment of the honorable superior court is reversed, and the cause remanded, with instructions to deny the motion to strike from appellant's affirmative defense and counterclaim, and overrule the demurrer to the same. A new trial shall be had at which appellant will be permitted to show such profits as would naturally and reasonably have accrued

to him had the contract been faithfully observed by respondent.

MOUNT, C. J., DUNBAR, RUDKIN, FULLERTON, HADLEY, and CROW, JJ., concur.

[No. 6229. Decided June 11, 1906.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE LEWIS, *Appellant*.[1]

BURGLARY—INFORMATION—CHARGE IN LANGUAGE OF STATUTE. An information charging the crime of burglary in the language of the statute defining the crime as an unlawful entry with intent to commit a crime "or" misdemeanor, is sufficient, especially in view of the statute providing that the information may allege in the alternative the different means by which an act was committed.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 6, 1906, upon a trial and conviction of the crime of burglary. Affirmed.

Austin M. Wade, for appellant.

E. E. Boner, for respondent.

FULLERTON, J.—The appellant was informed against for the crime of burglary, the charging part of the information being as follows:

"The said George Lewis, on the 8th day of December, A. D. 1905, in the county of Chehalis, in the state aforesaid, then and there being, did then and there, in the nighttime of said day, feloniously, unlawfully break and unlawfully enter the warehouse of the Northern Pacific Railway Company, a corporation doing business in the state of Washington, said warehouse then and there being a building in which goods, merchandise and valuable things were kept on deposit, and situated in the city of Montesano, in the county and state aforesaid, with the intent then and there to commit a misdemeanor or felony therein."

[1]Reported in 85 Pac. 668.

To this information the appellant demurred on the ground that it was not direct and certain as to the crime charged, and after trial and conviction, moved in arrest of judgment on the same ground; contending that the information was fatally defective because it charged the intent with which the building was entered in the alternative.

The general rule undoubtedly is that, where a statute enumerates in the alternative several acts the doing of which constitutes a crime, or where the intent or purpose necessary to constitute the offense is set out in several aspects disjunctively, it is necessary, if the several acts or several intents or purposes are to be joined in one indictment or information, to state them conjunctively, using the copulative "and" where the statute uses the disjunctive "or." But this rule, in so far as it relates to the intent in an indictment or information for burglary, has been changed by statute in this state. Burglary, as defined by § 7104 of the code (Ballinger's), (P. C., § 1606), consists of the unlawful entry in the nighttime, or the unlawful breaking and entry in the daytime, of any building in which goods and merchandise or valuable things are kept for use, sale, or deposit, with intent to commit a misdemeanor or felony. By § 7105 (Id.), (P. C., § 1607), it is provided that any person who makes such unlawful entry, or breaking and entry, as defined in the preceding section, shall be deemed to have made the same with intent to commit a misdemeanor or felony, unless the entry is explained by testimony satisfactory to the jury trying the case to have been made for some purpose without criminal intent.

Construing this statute, we have held that the state is not required to prove the specific intent with which a defendant unlawfully enters the building, but on the contrary have held that, when it shows that there was an unlawful entry in the nighttime, or an unlawful breaking and entry in the daytime, it makes a *prima facie* case to the effect that the entry

was made with intent to commit either a misdemeanor or a felony, and casts the burden of showing that the entry was for a purpose without criminal intent on the defendant, *State v. Wilson,* 9 Wash. 218, 37 Pac. 424; *State v. Anderson,* 5 Wash. 350, 31 Pac. 969; *Linbeck v. State,* 1 Wash. 336, 25 Pac. 452. This construction of the statute is tenable only on the principle that the legislature in defining the crime of burglary, used the words "misdemeanor or felony" in the sense of "crime," intending to make it burglary to unlawfully enter a building under the circumstances defined with intent to commit any form of crime whatsoever. We think now that this is its proper construction and, giving it that construction, the crime of burglary is correctly charged by using the language of the statute.

Informations for burglary, charging the intent in the form of the one now in question, were before this court in the cases of *State v. Garbe,* 34 Wash. 395, 75 Pac. 993, and *State v. Randall,* 36 Wash. 438, 78 Pac. 998. In the first case the information was upheld, and in the second, although the information was held insufficient on another ground, its sufficiency was not questioned on the ground here urged. Moreover the statute expressly provides that, when the crime may be committed by the use of different means, the indictment or information may allege the means in the alternative; and, further, that no indictment or information shall be held insufficient for any matter which was formerly deemed a defect but which does not tend to the prejudice of the substantial rights of the defendant upon the merits. Bal. Code, §§ 6844, 6851 (P. C., §§ 2097, 2104). While perhaps these cases and this statute are not directly in point on the question now urged, they sustain the general judgment of the court below to the effect that this defect in the information, if a defect at all, is not material.

The judgment is affirmed.

MOUNT, C. J., HADLEY, RUDKIN, DUNBAR, CROW, and ROOT, JJ., concur.

[No. 6264. Decided June 13, 1906.]

THE STATE OF WASHINGTON, *on the Relation of the Ami Company, Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY *et al., Respondents.*[1]

EMINENT DOMAIN—CONDEMNATION BY RAILWAY—FAILURE TO COMPLY WITH CORPORATION LAWS—FILING AND LICENSE FEES. Upon certiorari to review a proceeding by a foreign railway company to condemn lands, it cannot be objected that the company failed to show the payment of a license fee and the issuance by the secretary of state of a license to do business in this state, where (1) the objection is raised by private parties; (2) the application avers that the company is so authorized; (3) the articles of incorporation were filed prior to the enactment of the law requiring a license; and (4) where the law requires, and the court will presume, the payment of a fee and issuance of a license prior to the filing of the articles, which were shown to have been filed.

PLEADING—ANSWER IN CONDEMNATION PROCEEDINGS. In condemnation proceedings no answer is required, and it is not error to strike the same.

EMINENT DOMAIN—FOR RAILROAD—PUBLIC USE AND PUBLIC NECESSITY—EVIDENCE—SUFFICIENCY. Sufficient proof of public use and necessity is shown for the condemnation of a railroad right of way, for a branch three miles long, although there is at present but one factory in the territory to be served, where it appears that the territory is tide lands of considerable extent, peculiarly adapted to manufacturing purposes, and it is conceded that the branch when completed will be a commercial railroad, and that the use is a public one; since the question of public use is determined by the character and not the extent of the use.

Certiorari to review an order of the superior court for Pierce county, Huston, J., entered May 21, 1906, after a hearing on the merits, adjudging a public use, etc., in an action to condemn land for railway purposes. Affirmed.

H. S. Griggs, for relator. The case should have been dismissed because the Railway Company failed to prove its corporate capacity and right to condemn land or do any business in this state. Laws 1897, p. 134, Bal. Code, § 4285. The

[1]Reported in 85 Pac. 669.

right of eminent domain is in derogation of common law rights, and the provisions of the statutes will be construed strictly against its exercise. *Healy Lum. Co. v. Morris,* 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964; *State ex rel. Tacoma Ind. Co. v. White River Power Co.,* 39 Wash. 648, 82 Pac. 150; Lewis, Eminent Domain, §§ 310, 392; *Weed v. Goodwin,* 36 Wash. 31, 78 Pac. 36. Where an agreement has been made for the sale of the land, the petitioners cannot repudiate it and condemn the property. Lewis, Eminent Domain, § 304a and cases cited. The proposed railroad is but a spur to the Dempsey mill, and the public interests do not require it; a branch or spur road to a single industry is not of such public interest that private property can be taken for it. Lewis, Eminent Domain, §§ 171, 181, 182, and case cited; Id., pp. 439, 440, 896; *Chicago etc. R. Co. v. Wiltse,* 116 Ill. 449, 6 N. E. 49; *Sholl v. German Coal Co.,* 118 Ill. 427, 10 N. E. 199; *Gustafson v. Hamm,* 56 Minn. 334, 57 N. W. 1054; *Pittsburg etc. R. Co. v. Benwood Iron-Works,* 31 W. Va. 710, 8 S. E. 453; *Kyle v. Texas etc. R. Co.,* 3 Tex. App. C. C. 518; Const., art. 1, § 16; Bal. Code, § 5640.

B. S. Grosscup, for respondents.

RUDKIN, J.—On the 4th day of May, 1906, the Northern Pacific Railway Company filed its petition in the court below by which it sought to appropriate certain real property therein described for railway purposes. On the 19th day of May, 1906, a hearing was had on this petition, after notice to all parties in interest, and upon such hearing the court entered an order, adjudging the contemplated use a public one and that the public interest required the prosecution of the enterprise, and directing the empaneling of a jury to assess the damages. The Ami Company, one of the defendants in the condemnation proceeding, thereupon applied to this court for a writ of review to review the order of the court below on the questions of public use and public neces-

sity. The writ was allowed, return made, and the entire record is now before us.

The first assignment of error is that the respondent failed to show a compliance with the requirements of the act of March 13, 1897 (Laws 1897, p. 134). Section 1 of that act provides that, every corporation incorporated under the laws of this state, or any other state or territory of the United States, having a capital stock divided into shares, must pay to the secretary of state, for the use of the state, a fee of $10 upon the filing of the articles of incorporation in the office of the secretary of state, and that no such corporation shall have or exercise any corporate powers or be permitted to do any business in this state until such fee shall have been paid; and that the secretary of state shall not file articles of incorporation, or their equivalent, or give any certificate therefor until such fee shall have been paid. Section 5 provides for an annual license fee of $10 payable on or before the 1st day of July of each year, and if not paid until after that date a penalty of $2.50 is added until the 1st day of January following, after which the penalty is $5 per day for each day's delinquency.

As to the last provision, it is only necessary to say that the payment of the annual license fee is exclusively a matter between the state and the corporation, and a failure to pay such fee does not in any manner affect the powers or rights of the corporation as against third persons. Assuming that it is incumbent upon a corporation seeking to condemn to show a compliance with § 1, *supra*, the objection of the petitioner is untenable for several reasons: First, in its application for the writ of review the petitioner avers that the Northern Pacific Railway Company is a corporation organized and existing under the laws of the state of Wisconsin and is authorized to do business as a foreign corporation in the state of Washington. This, of itself, shows a compliance with the statute. Second, the articles of incorporation of the

Northern Pacific Railway Company were filed in the office of the secretary of state long prior to the passage of the act of 1897; and third, this court will presume, in any event, that the secretary of state performed his duty and did not file the articles of incorporation until the necessary fee was paid.

The next assignment is that the court erred in striking the answer filed in the condemnation proceeding. This court held in *Seattle etc. R. Co. v. Murphine*, 4 Wash. 448, 30 Pac. 720, that no answer is contemplated or required in such a proceeding. The defendant may offer any competent proof or establish any defense without answer, and therefore no error can be predicated on the ruling complained of.

The next assignment is that the testimony fails to show that the public interest requires the prosecution of the enterprise set forth in the petition for condemnation. The enterprise in aid of which the appropriation of the petitioner's land is sought is the construction of what is known as the "Tacoma Tide Flat Branch" extending a distance of about three miles from the main line of the Northern Pacific Railway Company at or near Tacoma to a point on Puget Sound. The territory to be served by this branch is about two or three miles in width and from five to six miles in length, and the testimony shows that this entire section is particularly adapted to manufacturing enterprises of various kinds. The petitioner apparently concedes that this branch, when constructed, will be a commercial railway, subject to all the provisions of the constitution and laws of this state governing railway and transportation companies, and that the use is a public one, and this is manifestly true. It is contended, however, that there is at the present time but one manufacturing plant in the territory to be served, and that this is not sufficient to show a necessity for the appropriation or that the public interest will be subserved thereby. We do not think this objection tenable. It clearly appears from the testimony that the territory along this branch is well adapted to manu-

facturing and perhaps to no other purpose. It is a fact of which we may take judicial notice that manufacturing plants do not and cannot locate at a distance from railroad or transportation facilities. No manufacturing plant of any moment would locate on the Tacoma tide flats at a distance of three miles from a railroad, as it would be impossible, or at least impracticable, to get material or supplies to its plant or its products to market; and to hold that the manufacturer must precede the railroad would be in effect to deprive the territory in question of both. The entire history of railroad building shows that the railroad comes first, and that the persons or industries to be served follow after. The question of the right to condemn is determined by the right of the public to use the railroad when constructed, rather than by the extent to which the right will be exercised. As said by the court in *Bridal Veil Lum. Co. v. Johnson,* 30 Ore. 205, 46 Pac. 790, 60 Am. St. 818, 34 L. R. A. 368:

"The fact that it [the railroad] has not been fully completed between the termini indicated in its articles of incorporation, or that there is at present no town, city, or settlement, or other railroad at its proposed southeastern terminus, or that its proposed route is through a rough, mountainous, and sparsely settled country, or that the plaintiff has not yet fully equipped the road, or supplied itself with complete and perfect terminal facilities, or that it has not charged the passengers upon its railroad any fare, does not affect its right to exercise the power of eminent domain. The question of public use is not determined, as a matter of law, by any of these things, but by the fact that the proposed road is intended as a highway for the use of the public in the transportation of freight and passengers. And it can make no difference that its use may be limited by circumstances to a small part of the community. Its character is determined by the right of the public to use it, and not by the extent to which that right is exercised: *De Camp v. Hibernia Railroad Co.,* 47 N. J. Law 43; *Phillips v. Watson,* 73 Iowa 28, (18 N. W. 659); *Ross v. Davis,* 97 Ind. 79. If every one having occasion to use the road as a passenger or for transportation

of freight may do so, and of right may require the plaintiff to serve him in that respect, it is a public way, although the number actually exercising the right is very small. The findings of the court show that the enterprise in which plaintiff is engaged, and for which it requires the land in question, is of this character, and therefore we have no alternative but to affirm the judgment."

In *Butte etc. R. Co. v. Montana etc. R. Co.,* 16 Mont. 504, 41 Pac. 232, 50 Am. St. 508, 31 L. R. A. 298, the court said:

"It is well established that if, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material: *Talbot v. Hudson,* 16 Gray 417. The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public highway although the number who have occasion to exercise the right is very small."

We are therefore satisfied that the fact of public use and public necessity was sufficiently established by the testimony.

The last assignment is that the petition for condemnation was insufficient and that the demurrer thereto should have been sustained. We think the petition was clearly sufficient, at least as against a general demurrer.

Finding no error in the record the judgment is affirmed, and to the end that the jury trial pending in the court below may not be further delayed, an order will be entered and certified to the court below forthwith, vacating the supersedeas heretofore granted.

MOUNT, C. J., FULLERTON, HADLEY, CROW, ROOT, and DUNBAR, JJ., concur.

[No. 5833. Decided June 15, 1906.]

PUGET SOUND MACHINERY DEPOT, *Respondent,* v. BROWN ALASKA COMPANY *et al., Appellants.*[1]

TRIAL—CONTINUANCE—ABSENT WITNESS. Abuse of discretion is not shown in refusing a continuance of a trial for a balance due on a sale, asked for on account of the illness and absence of the defendant, who resided in New York, where his deposition might have been taken, the action had been pending for many months and two or more continuances had been granted at defendant's request.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 11, 1905, upon findings in favor of the plaintiff after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Brown, Leehey & Kane, for appellants.

Ira Bronson and *D. B. Trefethen,* for respondent.

ROOT, J.—Respondent brought an action against appellant Brown Alaska Company and the John A. Mead Manufacturing Company, and another action against the appellant New York Alaska Development Company. By stipulation these actions were consolidated. They were brought to recover a balance due on account of machinery furnished. Subsequently the defendant John A. Mead Manufacturing Company was dismissed from the action, and is not before this court on appeal. The Brown Alaska Company denied that it had purchased any goods from respondent, but alleged that any purchases from respondent were for the New York Alaska Development Company. The latter company by answer and cross-complaint alleged that respondent had failed to furnish the character of machinery called for by the contract of purchase and had neglected to supply the same within the required time, and alleged damages in the sum of $10,000 as an offset and counterclaim. Upon the trial it was

[1]Reported in 85 Pac. 671.

stipulated that if judgment went against either, it might go against both of said appellants. The trial resulted in a judgment in favor of respondent from which this appeal was taken.

The only error assigned is that upon the action of the trial court in refusing a further continuance to appellants as requested at the time of the trial. The action was commenced in June, 1904. On January 7, 1905, the case was set for trial for February 24, 1905. On the latter day, at the request of appellant, the cause was continued until February 28, 1905. It was again continued until April 17, 1905. At this time appellants urged a further continuance which was granted until May 1, 1905. The trial court at the time of granting this last continuance informed the appellants that the cause must certainly be tried upon the date to which it was then continued.

The ground upon which appellants were given the continuances mentioned and upon which they sought a further extension were that one Brown, who was the president and the principal stockholder in the appellant companies and who had conducted the transaction with reference to the purchase of machinery and who resided in New York city, was then confined to his home city by illness and unable to come to Seattle for the trial. Appellants urged that his advice and counsel were needed in the conduct of the trial, and that his testimony was essential although less stress seems to be laid upon the necessity for his evidence than upon the importance of his knowledge and assistance in the conduct of the trial. It does not appear that he was too ill to give a deposition. In fact, we think it was practically conceded that his condition was such that his evidence by means of a deposition could have been taken. It was urged by appellants that his deposition could not have been taken advantageously for the reason that they did not know and he did not know what the evidence of respondent would be. Under the issues as presented by

the pleadings and stipulation at the time of the trial, the sale and delivery of the goods was admitted, and the controversy was principally as to the offset and counter-claim. This would be an affirmative matter for the defense to establish, and to support this it would seem that the deposition of Brown could have been taken and used advantageously if capable of supporting the allegations of said defense.

It is always well for trial courts to be liberal in the matter of granting continuances where a party or a material witness, on account of sickness or other unavoidable reason, is unable to be present at the time set for the trial of the cause, proper terms being imposed in order to save the opposing party harmless. But there must of necessity be some limitation on the extension of this courtesy and consideration. Ordinarily the action of the trial court in passing upon a request for a continuance is a matter of discretion and will not be reviewed by an appellate court in the absence of a showing that said discretion was abused. In view of the fact that this action had been pending for many months, that two or more continuances had been granted on the request of appellants, and that they had been notified by the trial court that the hearing would certainly be proceeded with at the date to which it was last continued, and in the light of all the facts shown by the record before us we are unable to say that the trial court abused its discretion.

The judgment is therefore affirmed.

MOUNT, C. J., DUNBAR, CROW, RUDKIN, FULLERTON, and HADLEY, JJ., concur.

[No. 6263. Decided June 15, 1906.]

THE STATE OF WASHINGTON, *on the Relation of Hubbard F. Alexander, Plaintiff,* v. THE SUPERIOR COURT FOR PIERCE COUNTY *et al., Respondents.*[1]

CERTIORARI TO REVIEW AN ORDER IN CONDEMNATION PROCEEDINGS—TIME FOR TAKING. Under Bal. Code, § 5645, restricting appeals in condemnation cases to thirty days, an application for a writ of certiorari to review the determination of public use or necessity is limited to a period of thirty days after the entry of the order, where no showing is made of special circumstances to excuse the delay and want of diligence (FULLERTON, J., dissenting).

Application for a writ of certiorari to review an order of the superior court for Pierce county, Huston, J., entered February 26, 1906, after a hearing on the merits, adjudging a public use, etc., in a proceeding to condemn land for railway purposes. Application dismissed and order affirmed.

Hudson & Holt, for plaintiff.

H. H. Field, for respondents. The petitioner need only prove its corporate existence, and it will be presumed that all steps, required by law to be taken, as a condition of doing business or of exercising the right of eminent domain, have been taken. *Jewell v. Rock River Paper Co.,* 101 Ill. 57; *Peoria etc. R. Co. v. Peoria etc. R. Co.,* 105 Ill. 110; *Spring Valley Water Works v. San Francisco,* 22 Cal. 434; *Brown v. Wyandotte etc. R. Co.,* 68 Ark. 134, 56 S. W. 862; *St. Louis etc. R. Co. v. Belleville etc. R. Co.,* 158 Ill. 390, 41 N. E. 916; *East St. Louis etc. R. Co. v. Belleville etc. R. Co.,* 159 Ill. 544, 42 N. E. 974; *Adamant Mfg. Co. v. Wallace,* 16 Wash. 614, 48 Pac. 415. The corporate existence may be shown by a certified copy of the articles of incorporation and proof of user or acts of business done by the corporation. 3 Cook, Corporations (5th ed.), p. 1944, note, § 753; *Ward v. Minne-*

[1]Reported in 85 Pac. 673.

sota etc. R. Co., 119 Ill. 287, 10 N. E. 365. Proof that the petitioner was a railroad corporation, that it had been doing business since its organization, had employed engineers, staked out its line, and actually commenced construction, were sufficient to show the petitioner's right to condemn. *Knapp, Burrell & Co. v. Strand,* 4 Wash. 686, 30 Pac. 1063; *Yakima Nat. Bank v. Knipe,* 6 Wash. 348, 33 Pac. 834; *Spokane etc. Lum. Co. v. Loy,* 21 Wash. 501, 58 Pac. 672, 60 Pac. 1119. A corporation need only prove a *de facto* existence in order to exercise the right of eminent domain, and the state, not the landowner, is the proper party to question its legal existence. *Spring Valley v. San Francisco,* and *Peoria etc. R. Co. v. Peoria etc. R. Co., supra; Oregon Short Line R. Co. v. Postal Tel. Cable Co.,* 111 Fed. 842, 49 C. C. A. 663; *Niemeyer & Darragh v. Little Rock etc. R. Co.,* 43 Ark. 111, 20 Am. & Eng. R. R. Cas. 174; *Railroad Co. v. Cashie etc. Lum. Co.,* 114 N. C. 690, 19 S. E. 646; *In re Milwaukee Southern R. Co.,* 124 Wis. 490, 102 N. W. 401. A corporate existence is not put in issue by a general denial, or a denial of all allegations therein, except those admitted or denied, like the one in the case at bar. *Denver etc. R. Co. v. Union Pac. R. Co.,* 34 Fed. 386; *Board of Education v. Prior,* 11 S. D. 292, 77 N. W. 106; *Fletcher v. Co-operative Co.,* 58 Neb. 511, 78 N. W. 1070; *Rembert v. South Carolina R. Co.,* 31 S. C. 309, 9 S. E. 968, 39 Am. & Eng. R. R. Cas. 252; *In re New York etc. R. Co.,* 99 N. Y. 12, 1 N. E. 27, 23 Am. & Eng. R. R. 43. The answer is, in substance, an admission of the corporate existence. 2 Lewis, Eminent Domain (2d ed.), § 390; 7 Ency. Plead. & Prac. 538, note 6; *Chicago etc. R. Co. v. Porter,* 43 Minn. 527, 46 N. W. 75; *Northern Pac. R. Co. v. Coleman,* 3 Wash. 228, 28 Pac. 514. The constitution and laws of the state attach the qualities of a common carrier, and a public use, to all railroad companies, and it was not necessary to prove the character of the railroad. 7 Words & Phrases, §§ 5904, 5907; Constitution, art. 12, §§ 13-16, 20,

21; Pierce's Code, §§ 5114, 7053, 7782, 7797, 7801, 7804; (B. C., §§ 4250, 4313, 4328, 4303, 4306). The court would take judicial notice that logging railroads or other private roads, are not constructed across the entire length of the state, and the contentions of petitioner are met by, *Healy Lum. Co. v. Morris,* 33 Wash. 490, 74 Pac. 681; *North River Boom Co. v. Smith,* 15 Wash. 138, 45 Pac. 750; *Prescott Irr. Co. v. Flathers,* 20 Wash. 454, 55 Pac. 635. Proof that petitioner is incorporated, that it has the right of eminent domain, and has located its road is sufficient to show a public use. *Union Pac. R. Co. v. Colorado Postal etc. Co.,* 30 Colo. 133, 69 Pac. 564, 97 Am. St. 106; *De Buol v. Freeport etc. R. Co.,* 111 Ill. 499; *State ex rel. Smith v. Superior Court,* 30 Wash. 219, 224, 70 Pac. 484. The taking of land by a railroad company is the taking for a public use. *Prescott Irr. Co. v. Flathers, supra;* Const., art. 12, § 1; Bal. Code, § 4154 (P. C. § 5869); *New York etc. R. Co. v. Offield,* 77 Conn. 417, 59 Atl. 510; *Bradley v. New York etc. R. Co.,* 21 Conn. 294, Note to *Barre R. Co. v. Montpelier etc. R. Co.,* in 4 L. R. A. 785. Proof of efforts to purchase is not required as a condition precedent. 2 Lewis, Eminent Domain (2d ed.), § 301, p. 744, notes 11, 12; *Lewis County v. Scobey,* 31 Wash. 357, 71 Pac. 1029. The objections raised are technicalities, and there was ample proof to sustain the order under the rule in, *State ex rel. Smith v. Superior Court, supra; State ex rel. Harlan v. Centralia-Chehalis etc. Power Co.,* 42 Wash. 632, 85 Pac. 344. If there was a want of proof, the reversal should be with directions to allow proof as to such matter only. *Chicago etc. R. Co. v. Porter, supra.*

Crow, J.—On February 15, 1906, the Chicago, Milwaukee and St. Paul Railway Company of Washington filed in the superior court of Pierce county its amended petition to appropriate real estate of Hubbard F. Alexander in said

county for a right of way. On February 26, 1906, the judge of said court found the contemplated use for which said real estate is sought to be taken is public, and ordered said cause to be continued to April 2, 1906, for the determination of damages and compensation to be paid to the persons entitled thereto. By subsequent continuances the matter of the assessment of damages and compensation was finally set for June 14, 1906. On May 28, 1906, the said Hubbard F. Alexander, as relator herein, applied to this court for a writ of certiorari to review the said proceedings and order of the superior court. Upon this application a show cause order was issued. In response to said order the respondents have brought up a complete record of the proceedings in the superior court, including all the evidence, and have also made a motion in this court to dismiss this proceeding for the reasons that the writ of certiorari herein was not applied for or issued within the time allowed by law, and that the relator has failed to exercise due and reasonable diligence in applying for the same. The hearing in this court has been had not only on said motion to dismiss but also upon the merits.

The order declaring a public use was entered February 26, 1906, and relator's application was made to this court on May 28, 1906. Our code fails to designate any time within which an application for a writ of certiorari must be presented, and the respondents contend that where no such time is fixed by statute, a writ of certiorari to review an order cannot be issued after the expiration of the time within which such order might be reviewed upon appeal if an appeal were allowed.

In *Spooner v. Seattle,* 6 Wash. 370, 33 Pac. 963, this court said: "The writ of *certiorari* is in the nature of an appeal, and, while the statute does not fix the time within which the writ should be applied for, it should be applied for within a reasonable time after the act complained of has been done. . . ."

In the recent case of *State ex rel. Lowary v. Superior Court,* 41 Wash. 450, 83 Pac. 726, we said: "The statute does not fix the time within which such applications must be made, but the courts by analogy apply the limitation fixed by law for the prosecution of an appeal. Ordinarily this court will not entertain jurisdiction of an application of this kind after the time limited by law for prosecuting an appeal has expired. . . ." In that case, however, we issued the writ by reason of special facts appearing therein. This rule of practice as stated in the *Lowary* case is in perfect harmony with the current of authority as announced in many well considered cases. See, also: *People v. Supervisors,* 15 Wend. 198; *Elmendorf v. Mayor of New York,* 25 Wendell 693; *People v. Mayor of New York,* 2 Hill 9; *Long v. Ohio River R. Co.,* 35 W. Va. 333, 13 S. E. 1010; *Burgett v. Apperson,* 52 Ark. 213, 12 S. W. 559; *Reynolds v. Superior Court,* 64 Cal. 372, 28 Pac. 121; *State ex rel. Dalrymple v. Milwaukee County,* 58 Wis. 4, 16 N. W. 21; *Crosby v. Probate Court,* 3 Utah 51, 5 Pac. 552.

No showing has been made by the relator herein to explain his lack of diligence, nor do any extenuating circumstances appear from the record sufficient to justify his delay, or call upon us to exercise our discretion in awarding him additional time beyond the period above mentioned. The respondents contend that the ruling or decision of the superior court sought to be reviewed herein is not a final judgment, but that it is a preliminary order, and that as appeals from any order other than a final judgment must under the provisions of the general appeal act, Bal. Code, § 6502 (P. C., § 1050), be taken within fifteen days after the entry of such order, an application for a writ of certiorari to review the order here involved should, in the absence of special circumstances authorizing a later application, be made within such period of fifteen days.

We do not think this contention can be sustained as the

order here sought to be reviewed is not one of those enumerated in subdivisions two to six of Bal. Code, § 6500, to which the fifteen day limit is applied by § 6502, nor do we think the ninety day period mentioned in said § 6502 is applicable here. A writ of certiorari to review an order adjudging a public use in a condemnation proceeding is authorized by reason of the fact that the appeal awarded by the eminent domain act, Bal. Code, § 5645, only affects the propriety and justice of the amount of damages awarded. *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158. The appeal, however, that has been provided by said § 5645, must be taken within thirty days after the entry of the judgment for damages, and we think this period should be adopted by us as the one within which a writ of certiorari to review an order of the character here involved should issue, said period to run from the date of the entry of said order adjudging a public use. The eminent domain act is a law designed to secure a speedy hearing and determination of the right to condemn, and damages to be awarded for the taking of private property. Public interests are involved, which fact in all probability controlled the legislature in fixing the time for appeal at thirty days instead of ninety days as in most other actions.

It would be inconsistent for us to hold that the usual ninety day period for appeal fixed by Bal. Code, § 6502 (P. C., § 1050), should apply by analogy in limiting the period of time in which a writ of certiorari should issue to review an order of this character, while the eminent domain act itself by § 5645, directs that the only appeal for which it provides must be taken within thirty days after the entry of the final judgment for damages. It would be an anomaly if the landowner had ninety days within which to apply for a writ to review the preliminary order adjudging a public use, while if the cause proceeded to a judgment for damages he would have only thirty days within which to appeal from

such final judgment. Trial courts usually proceed promptly to ascertain the damages after said preliminary order has been made, and under such a holding a chain of circumstances might arise whereby a timely application for a writ to review the preliminary order might be made, after the time for the taking of an appeal from the final judgment in the same condemnation proceeding had expired. We therefore hold that in the absence of any unusual circumstances calling for a less stringent rule, we should limit the time within which an application for a writ of certiorari may be made to review an order in condemnation proceedings such as the one here involved, to the period of thirty days from and after the entry of such order. The relator having failed to make his application within such time has not proceeded with due diligence, and his application should be dismissed.

Although we shall not discuss the merits we will nevertheless state that after a careful examination of the entire record we fail to find that any error has been committed by the honorable superior court.

It is ordered that the relator's application be dismissed, and that the judgment of the superior court be affirmed.

MOUNT, C. J., DUNBAR, ROOT, HADLEY, and RUDKIN, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to concur in either the reasoning or the conclusion of the foregoing opinion. Had the court followed the intimation given in the case of *State ex rel. Lowary v. Superior Court,* 41 Wash. 450, 83 Pac. 726, and held that writs of review must be applied for within the time in which an appeal might be taken under the general statutes relating to appeals, no serious objection could be urged against the rule, as it would then have been certain, easily understood, and applicable in all cases. But the court has seen fit to select the limitation prescribed by a special statute for an appeal from a judg-

ment in a special proceeding, and make it applicable to judgments of the character of the one before us. It is true that the judgment sought to be reviewed, and the judgment the time to appeal from which is held to be controlling, are both judgments in condemnation proceedings had under the statute of eminent domain; and that it is this fact that persuaded the court that there was such an analogy between the two judgments that the time limited for an appeal from the one ought to control the time within which to review the other, but it seems to me that this as a reason is inconclusive, and as a policy is harmful. That the judgments are separate and distinct was determined by this court in the case of *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158; and that the right to review the present judgment by a writ of review rests in the fact that there is no right of appeal from it was determined in the case of *Seattle etc. R. Co. v. Bellingham Bay etc. R. Co.*, 29 Wash. 491, 69 Pac. 1107. It being true, therefore, that there is no connection between the judgments, I am unable to see why the rights relating to the one should in any manner be allowed to affect the other. Since they are separate and distinct, each should stand on its own bottom in so far as the right to review it is concerned, and the right should be determined by the general law rather than from any analogy between them.

I think the rule adopted harmful as a policy because it adds another element of uncertainty to the procedure by which causes are brought to this court for review. This uncertainty arises from the fact that there are many judgments that cannot be reviewed but by this writ, and the precedent of this case establishes the principle that special limitations on the right of appeal contained in special statutes are applicable when the right to review any of such judgments are called in question. The result is that instead of having one general limitation applicable to all judgments alike, we have different limitations applicable to different judgments, with

no rule to determine with certainty when they are applicable. It seems to me that only the positive mandate of the statute ought to drive the court to the adoption of such a procedure. I dissent, therefore, from the judgment of dismissal.

[No. 5413. Decided March 28, 1905.]

Delia Harrington *et al., Appellants,* v. E. M. Gordon *et al., Respondents.*[1]

Appeal—Dismissal—Cessation of Controversy. An appeal will not be dismissed on the ground that the controversy has ceased, by reason of a settlement where the record fails to show any such settlement.

Pleading—Estoppel—Inconsistent Positions. After interposing a demurrer on the ground that a certain party was a necessary party plaintiff, the defendants, after such party has been brought in as a party plaintiff, are estopped to claim the original complaint fails to state any cause of action as to such party.

Parties—Action on Joint Bond—Necessary Parties Plaintiff. Where the interests of two obligees, named in a statutory bond, are several and not joint, or if the separate property of only one is affected, such party may maintain an action alone, to recover his damages sustained, without joining his co-obligee.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 3, 1904, upon sustaining a demurrer to a complaint in an action upon a bond. Reversed.[2]

Roberts & Leehey, for appellants.

Byers & Byers, for respondents.

Crow, J.—The original complaint is not in the transcript, but the first amended complaint, which is before us, shows that this action was commenced by Delia Harrington alone,

[1]Reported in 80 Pac. 187.

[2]Note. This case should have appeared in Vol. 37, having been omitted by mistake of the reporter. Rep.

against respondents, to recover damages on a garnishment bond, given to said Delia Harrington and M. C. Harrington, her husband, jointly, in a former action brought against them by one J. W. Tilford, said garnishment bond having been given by Tilford as principal, and the respondents E. M. Gordon and C. G. Bradner as sureties. To the first amended complaint respondents interposed a special and general demurrer, one of the grounds of the special demurrer reading as follows: "That there is a defect of parties plaintiff, in that M. C. Harrington is a necessary party plaintiff." The demurrer being sustained, appellants served and filed a second amended complaint in which Delia Harrington and M. C. Harrington, her husband, were both made plaintiffs. This second amended complaint in substance alleged, the bringing of the original action against appellants by J. W. Tilford, the execution of the bond, the issuance of the writ of garnishment, and the conditions of the bond, with a copy attached; that afterwards Delia Harrington appeared separately in said original action, procured a discharge of the garnishment, a dismissal of the action, and final judgment against Tilford. The damages sustained by said Delia Harrington were also pleaded.

The second amended complaint also pleaded the following facts, not in the first amended complaint: That the money garnisheed in the possession of the bank, the garnishee, was the sole, separate, and individual property of Delia Harrington, was on deposit in her name, subject to her individual check; that M. C. Harrington claimed no title or interest therein; that he was in no way injured or harmed by the garnishment, had no interest in the garnishment bond, and that all damages accruing thereon were due to Delia Harrington alone. To this second amended complaint a general demurrer was interposed and sustained. Appellants electing to stand on their pleading, the action was dismissed, and judgment for costs entered in favor of respondents. From said final judgment this appeal is taken.

Respondents have moved to dismiss the appeal for the reason that there is now no controversy pending between the parties, claiming all differences between them have been fully settled. Upon the showing made, we are unable to find any such settlement. The motion to dismiss is denied.

Respondents in their answer brief now insist that as the second amended complaint shows the giving of the garnishment bond by appellants to Delia Harrington and M. C. Harrington jointly, and further shows that the original action was dismissed and the garnishment discharged as to Delia Harrington, but does not make any showing as to M. C. Harrington, the second amended complaint fails to state a cause of action in his favor, and is therefore insufficient. In other words, respondents, by their special demurrer to the first amended complaint, insisted that M. C. Harrington was a necessary party plaintiff. Now, when he is a party plaintiff, they contend that as he claims no cause of action on the bond, neither one of appellants can recover. We think the position of respondents is inconsistent, and that whether M. C. Harrington is now properly or improperly before the court as a party plaintiff, they cannot complain.

The only question now to be considered is whether the second amended complaint states a cause of action on behalf of Delia Harrington, and whether she alone can sue and recover on the bond. No question of community interests is involved here, only the separate property of Delia Harrington being affected. Therefore, in passing on her rights as a joint obligee under the bond, such rights will be considered the same as though the other obligee was some person other than her husband.

While it is true that two obligees are named in the bond, we think either one or both of them could bring an action thereon, provided the party or parties bringing the action had sustained damages. While the bond runs to both appellants, it was given without their consent. They are in no way re-

sponsible for the fact that they were both joined. If their interests are several and not joint, or if the separate property of one obligee only is held under the garnishment proceedings, certainly that one has the right to proceed upon the bond alone, and recover his or her damages sustained. The supreme court of Ohio, in *Alexander v. Jacoby,* 23 Ohio St. 358, 383, used the following language:

"Where an attachment undertaking is executed, under the provisions of the civil code, to two or more persons conditioned 'to pay to them the damages which they may sustain,' etc., and the order of attachment be wrongfully obtained as against some of the obligees only, a right of action on the undertaking accrues to those obligees as against whom the order was wrongfully obtained and who were injured thereby; and in an action thereon by the injured parties, it is not necessary that those obligees, as against whom the order of attachment was rightfully obtained, should be joined either as plaintiffs or defendants. In determining whether the right of action on such undertaking be several or joint only, not only the terms of the bond, but also the provisions of the statute which authorize its execution must be considered, for such provisions must be regarded as much a part of the bond as if they were embodied in its terms. The undertaking is executed to any or all of the defendants in the action, at the option of the plaintiff, and not by the consent of the obligees. The order of attachment may be levied upon the separate property of the defendants as well as upon their joint property. It may be dismissed as to some and enforced against other defendants, and on the final trial of the action, judgment may be given for some and against others. It seems to us, therefore, that as the injury, against which the undertaking was intended to indemnify, may be several as well as joint, that the right of action thereon must also be several as well as joint. And as the general rule of the code is, that 'every action must be prosecuted in the name of the real party in interest,' we are of opinion that in actions on such undertakings, those obligees, and only those, who have an interest in the damages sought to be recovered, must be joined as plaintiffs or made parties to the suit. If the foregoing conclusion be correct, it follows that in an action on such under-

taking by those obligees who have an interest in the damages sought to be recovered, it is not necessary to aver or prove that the attachment had been discharged as against other obligees who have no interest therein and who are not necessary parties to the action."

We think the reasoning of the Ohio court applies here, and adopt the same. *Deegan v. Deegan,* 22 Nev. 185, 37 Pac. 360, 58 Am. St. 742; *Summers v. Farish,* 10 Cal. 347; *Lally v. Wise,* 28 Cal. 540. The second amended complaint stated a cause of action in favor of Delia Harrington. The respondents were in no position at that time to object to the presence of M. C. Harrington as a plaintiff. The trial court erred in sustaining the demurrer to the second amended complaint.

The judgment of the trial court is reversed, and this cause remanded for further proceedings in accordance with this opinion.

MOUNT, C. J., RUDKIN, ROOT, and DUNBAR, JJ., concur.

[No. 5778. Decided February 27, 1906.]

W. P. SANDERSON, *Appellant*, v. THE CITY OF BALLARD, *Respondent*.[1]

Appeal from a judgment of the superior court for King county, Griffin, J., entered February 24, 1905, upon the verdict of a jury rendered in favor of the defendant, in an action to annul a special assessment. Reversed.

Sweeney & Steiner, for appellant.
M H. Ingersoll, for respondent.

PER CURIAM.—Appellant commenced an action to restrain respondent from collecting a tax levied upon his property under the special assessment proceeding involved in the case of *Monk v. Ballard*, *ante* p. 35, 84 Pac. 397. While the suit was pending appellant, in order to remove the apparent cloud upon the title to his property, paid into the treasury of the city, under protest, the amount of the tax levied against him, and the action was thereupon transferred to the law department of the court, where judgment went in favor of the city. Much, if not all, of appellant's property was situated similarly to the tide lands of the appellants in the case just referred to, and the attempted assessment herein was made by the same proceedings referred to in that case.

The judgment of the honorable superior court is reversed, with instructions to enter judgment for appellant, as prayed for in his complaint.

[No. 6035. Decided February 27, 1906.]

JAMES McCURDY, *Appellant*, *v.* THE CITY OF BALLARD, *Respondent*.[1]

Appeal from a judgment of the superior court for King county, Frater, J., entered May 6, 1905 Reversed.

Shank & Smith, for appellant.
M. H. Ingersoll, for respondent.

PER CURIAM.—It was stipulated by the parties to the above entitled action that it should be disposed of in accordance with the decision that should be rendered in the case of *Monk v. Ballard*, *ante* p. 35, 84 Pac. 397. Hence, the judgment of the honorable superior court will be reversed, with instructions to enter judgment for appellant

[1]Reported in 84 Pac 399

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claim to the land, and upon being asked as to their right thereto made no claim of right and consented to remove when required to do so, the only evidence of claim of title being the claim of one Indian witness, who would be its chief beneficiary, to the effect that he had paid $300 and received a writing from the owner giving him the perpetual right to reside upon the land, which writing was lost, and which evidence was contradicted by the declarations and acts of the other Indians. *Lohse v. Burch*..... 156

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3. SAME—PAYMENT OF TAXES—COLOR OF TITLE. To obtain title, under the statute, by the payment of taxes for seven years, the party must hold under color of title and be in the actual, open, and notorious possession of the land, or it must be "vacant and unoccupied." *Id*..... 156

4. ADVERSE POSSESSION—WHEN NOT CONTINUOUS—EVIDENCE—SUFFICIENCY. Title cannot be acquired by adverse possession from the fact that the plaintiff in 1875 constructed a fence from one inlet of Puget Sound to another, inclosing part of the land with some of his own, and that he logged the land at that time, where, for more than twenty years last past, it has been vacant and unoccupied by any one. *Turner v. Ladd*..... 274

ADVERTISEMENT:

Publication of process, see PROCESS, 1.

AFFIDAVITS:

For service of process by publication, see PROCESS, 1
How brought up, see APPEAL AND ERROR, 13, 14.
To impeach, see WITNESSES, 4.

AFTER-ACQUIRED PROPERTY:

Bond for deed, prior to patent, see DEEDS, 3.

AGENCY:

See PRINCIPAL AND AGENT.

AGREEMENT:

See CONTRACTS.

ALIENATION:

Of affections, see HUSBAND AND WIFE, 1.

AMENDMENT:

Of municipal charter, see MUNICIPAL CORPORATIONS, 1-5.
Of pleadings, see PLEADING, 3, 5.
Record on appeal, see APPEAL AND ERROR, 12.

ANCIENT DOCUMENTS:

Ancient deeds, presumptions, time, see DEEDS, 1, 2.

ANSWER:

In pleading, see PLEADING, 7.

APPEAL AND ERROR:

I. NATURE AND JURISDICTION.

Right of appeal from commissioner of public lands, see MANDAMUS, 1.

II. DECISION REVIEWABLE.

Cessation of controversy, see APPEAL AND ERROR, 15, 16.
Decision of board of state land commissioners, see PUBLIC LANDS, 6.

1. APPEAL—FINAL ORDERS—VACATION OF LEAVE TO SUE EXECUTORS. The vacation of an order granting leave to sue executors of an estate upon a rejected claim in effect determines the right to maintain the action, and is appealable as a final order. *In re Crosby*..... 366

2. APPEAL—REVIEW—APPOINTMENT OF RECEIVER. The propriety of appointing a receiver must be raised by direct appeal from the order of appointment, and cannot be questioned upon an appeal from a judgment distributing the proceeds of the receiver's sale. *Jones v. North Pacific Fish & Oil Co*..... 332

III. PRESERVATION OF GROUNDS.

Findings, necessity, see APPEAL AND ERROR, 22.

3. APPEAL — REVIEW — OBJECTIONS TO EVIDENCE — HARMLESS ERROR. Upon an assignment of error as to the admission of the evidence of a committing magistrate, in that he undertook to state the evidence of witnesses as to other offenses for which the defendant had been prosecuted, reversible error will not be found where it does not clearly appear that the witness undertook to testify to the testimony of such witnesses, and where no objection to the testimony was made on that ground. *State v. Poole*..... 192

4. APPEAL—REVIEW—EXCEPTIONS—TRIAL—IMPROPER STATEMENTS OF ATTORNEY. A mere exception to improper statements of counsel to the jury, without moving the court in the matter, is insufficient to secure a review of error assigned thereon. *Taylor v. Modern Woodmen of America*..... 304

5. APPEAL—REVIEW—EXCEPTIONS—SUFFICIENCY. An exception to a finding of the amount of interest due on a note, as unsupported by and contrary to the evidence, is sufficient to raise the point that, under the laws of the state where made, which were put in evidence,

APPEAL AND ERROR—CONTINUED.

the interest should have been computed at a different rate after maturity. *Bank v. Doherty*..... 317

6. APPEAL AND ERROR — FINDINGS — EXCEPTIONS — TIME FOR FILING. Where findings were filed without service upon the opposite party, written exceptions thereto, filed within five days after notice of the findings, are in time, and the exceptions and statement of facts will not be struck out. *Mann v. Provident Life and Trust Co* 581

IV. PARTIES.

Parties voluntarily dismissed, see APPEAL AND ERROR, 10.

V. REQUISITES FOR TRANSFER OF CAUSE.

Time to apply for certiorari, see CERTIORARI, 1.

7. APPEAL—ORAL NOTICE—DENIAL OF NEW TRIAL. Where a motion for a new trial is seasonably made before the entry of judgment, oral notice of appeal may be given at the time of overruling the motion for a new trial, although judgment was entered in the meantime, and such notice is effectual as an appeal from the judgment. *Creech v. Aberdeen* 77

8. APPEAL—DISMISSAL—ORAL NOTICE—ENTRY. Where oral notice of appeal is given in open court the fact that the clerk entered the same in the minute book instead of in the journal, as required by Bal. Code, § 6503, is not ground for the dismissal of the appeal. *Id*..... 77

9. APPEAL—DISMISSAL—NOTICE—SERVICE. An appeal will not be dismissed because of the filing of the notice of appeal before service thereof, or because of failure to file proof of service within five days, where the proof was subsequently made and no delay or injury results, in view of Laws 1899, p. 79, providing that an appeal shall not be dismissed for any defect in the notice or service thereof if the appellant shall forthwith perfect the appeal. *Reynolds v. Reynolds* 107

10. APPEAL—NOTICE—STATEMENT OF FACTS—PARTIES. No notice of appeal or proposed statement of facts need be served upon a party who was voluntarily dismissed from the action by the appellant at the trial. *Sheehan v. Bailey Building Co*..... 535

11. APPEAL AND ERROR—DISMISSAL—BONDS—AMOUNT OF SUPERSEDEAS BOND—MONEY JUDGMENT—INTERPLEADER. In an action of interpleader to recover a deposit in a bank, in which the money in controversy was deposited with the clerk of the court and judgment was entered ordering the clerk to pay it to the plaintiff, an appeal bond, conditioned also to effect a supersedeas, in a sum fixed by order of court, but less than double the amount of the judgment, is sufficient to give the supreme court jurisdiction of the appeal, inasmuch as it is for the recovery of specific personal property (overruling *Id.*, 37 Wash. 443). *Pierson v. Peirce*..... 164

APPEAL AND ERROR—CONTINUED.

VI. EFFECT AND STAY.

Sufficiency of bond as stay, see APPEAL AND ERROR, 11.

VII. RECORD.

Notice of filing statement, see APPEAL AND ERROR, 10.
Failure to bring up evidence, see APPEAL AND ERROR, 22.

12. APPEAL—RECORD—SUPPLEMENTAL RECORD. Failure of the record on appeal to show service of the notice of appeal may be cured by the filing of a supplemental record showing the service. *Spring Hill Irr. Co. v. Lake Irr. Co*..... 379

13. APPEAL—RECORD—AFFIDAVITS. Affidavits used upon a motion for a new trial cannot be considered on appeal when not embodied in a statement of facts. *Taylor v. Modern Woodmen of America*.. 304

14. APPEAL—RECORD—REVIEW—AFFIDAVITS NOT BROUGHT UP. An assignment of error in denying a motion for a change of venue will not be considered by the supreme court when the affidavits used at the hearing are not brought up by a bill of exceptions or statement of facts. *Allen v. Baxter*..... 434

VIII. BRIEFS.

IX. MOTIONS AND DISMISSALS.

Failure of clerk to enter, see APPEAL AND ERROR, 8.
Insufficiency of bond, see APPEAL AND ERROR, 11.
Notice, filing prior to service, see APPEAL AND ERROR, 9.

15. APPEAL—DISMISSAL—CESSATION OF CONTROVERSY. An appeal will not be dismissed on the ground that the controversy has ceased by reason of a settlement where the record fails to show any such settlement. *Harrington v. Gordon*..... 692

16. APPEAL — DISMISSAL — CESSATION OF CONTROVERSY — INVOLUNTARY COMPLIANCE WITH JUDGMENT. An appeal from a mandate compelling municipal authorities to submit charter amendments to a vote of the people will not be dismissed for the reason that the defendants have complied with the order, where such compliance was involuntary, and only after having been denied a supersedeas of the judgment upon an appeal therefrom. *Hindman v. Boyd*..... 17

X. REVIEW.

See NEW TRIAL.
Allowance of attorney's fees, see MECHANICS' LIENS, 2.
Harmless error, see CRIMINAL LAW, 10; INDEMNITY, 1.
Of appointment of receiver on appeal from judgment, see APPEAL AND ERROR, 2.

17. APPEAL—REVIEW—HARMLESS ERROR. The admission of improper evidence is harmless in an action tried by the court without a jury. *Lewiston Water etc. Co. v. Brown*..... 555

APPEAL AND ERROR—CONTINUED.

18. SAME—HARMLESS ERROR. Error assigned upon the misstatement of the evidence by counsel, in argument to the jury is cured where the court immediately upon exceptions taken instructs the jury to disregard the same. *Taylor v. Modern Woodmen of America*.... 304

19. APPEAL—REVIEW—HARMLESS ERROR. Excluding evidence as to whether the deceased had complained of weakness is not prejudicial where the witness had testified to an instance of that character. *Id*..... 304

20. APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated on the admission in evidence of original papers and files in certain actions, instead of certified copies, in that it would cast the additional burden upon appellants of substituting certified copies to be attached to a statement of facts, when by stipulation the originals were attached to the statement of facts, thereby obviating such additional expense. *O'Brien v. Allen*..... 393

XI. DETERMINATION AND DISPOSITION OF CAUSE.

21. APPEAL—DECISION. Where, upon an appeal from a writ of mandate requiring the submission of charter amendments to a vote of the people, at the time of the hearing of the appeal the amendment has been submitted to a vote, and carried, the judgment will not be reversed for error in sustaining a demurrer to the answer of the city, but the cause will be remanded for the purpose of taking testimony upon the issues raised. *Hindman v. Boyd*..... 17

22. APPEAL—FAILURE TO MAKE FINDINGS—DECISION. Upon a trial before the court without a jury in an action for breach of contract, where the court fails to find the amount of the damages, and the evidence is not brought up on appeal, the judgment will be reversed with directions to find the amount of damages sustained, if any. *Sproul v. Huston*..... 106

23. APPEAL—DECISION. Upon reversing an action to recover possession of real estate and quiet title, for failure of proof of title in either party, the cause will be remanded for further proceedings, in case the plaintiff elects to offer further proof. *Lohse v. Burch*.. 156

24. SAME—APPEAL—DECISION—REMAND. Remanding a case on appeal with directions to determine the priority of rights of respective claimants to the waters of a stream does not confine the inquiry to the matter of appropriation, or exclude rights by prescription. *Spring Hill Irr. Co. v. Lake Irr. Co*..... 379

25. COSTS—APPEAL—MODIFICATION OF ORDER. Upon the modification of a temporary injunction, by the supreme court, the appellant should not recover costs on the appeal where they were resisting any injunction whatever, and it does not clearly appear that the modification of the order was especially called to the attention of the trial court. *Hart v. Seattle*..... 113

APPEARANCE:

By guardian for infants, see INFANTS, 1.

Of attorney representing adverse interest, see ATTORNEY AND CLIENT, 1.

1. APPEARANCE — WAIVER OF OBJECTIONS — JURISDICTION OF SUBJECT-MATTER. A general appearance for the purpose of dismissing an action against a foreign corporation of which the court has no jurisdiction of the subject-matter does not confer jurisdiction or waive the objection. *Hammel v. Fidelity Mutual Aid Association*.... 448

APPOINTMENT:

Of executor and administrator, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Of receiver, see RECEIVERS, 1.

APPROPRIATION:

Appropriation of waters, *res adjudicata*, see JUDGMENT, 1.

ARCHITECTS:

Employment for erection of capitol, see STATES, 1, 2.

ARGUMENT OF COUNSEL:

In civil actions, see TRIAL, 3.

ASSAULT AND BATTERY:

See CRIMINAL LAW, 2.

Evidence of, see CRIMINAL LAW, 6.

ASSESSMENT:

Compensation for property taken or injured for public use, see EMINENT DOMAIN, 19-21.

Of expenses of public improvements, see DRAINS, 1-6.

Of tax, see TAXATION.

Reassessments for local improvements, see MUNICIPAL CORPORATIONS, 14, 17, 18.

ASSIGNMENTS:

Leases, see LANDLORD AND TENANT, 2, 3.

Of pledge of stock, see PLEDGES, 1.

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 9-11.

ATTACHMENT:

Action by receiver to set aside, see CORPORATIONS, 2.

ATTORNEY AND CLIENT:

Allowance of counsel fees in divorce proceedings, see DIVORCE, 2.

Fees, allowance in mechanic's lien foreclosure, see MECHANICS' LIENS, 2.

ATTORNEY AND CLIENT—CONTINUED.

Fees as damages in action on injunction bond, see BONDS, 2.
Fees on foreclosure in action to redeem, see MORTGAGES, 4.
Power to contract, see STATES, 1, 2.

1. ATTORNEY AND CLIENT — REPRESENTING ADVERSE INTERESTS. The fact that an attorney had represented the plaintiff, by courtesy, in another action between other parties respecting certain personal property, would not preclude his appearance for the defendants in an action of replevin for the same property, where he had in the former action particularly represented the defendants, and no inconsistency appears in such representation. *Shine v. Culver*... 484

AUTHORITY:
Of agent, see PRINCIPAL AND AGENT, 1, 2.

BANKS AND BANKING:
Depositor, offset against estate, see EXECUTORS AND ADMINISTRATORS, 6.

BAR:
Of action by former adjudication, see JUDGMENT, 1-3.

BENEFITS:
Assessments according to, see MUNICIPAL CORPORATIONS, 19.
Deduction of benefits from damages in condemnation proceedings, see EMINENT DOMAIN, 19.
Deduction of, in local improvements, see MUNICIPAL CORPORATIONS, 21-24.

BEST AND SECONDARY EVIDENCE:
In civil actions, see EVIDENCE, 1.
Written answers in report, see INSURANCE, 4.

BILL OF LADING:
See CARRIERS, 1-8.

BILL OF SALE:
See SALES.

BILLS AND NOTES:
Negotiability of bill of lading, see CARRIERS, 6, 7.
Note not due at death of holder, offset, see EXECUTORS AND ADMINISTRATORS, 6.
Payment in grain, see PRINCIPAL AND AGENT, 2.
Payment by note after dissolution, see PARTNERSHIP, 1.
Rate of interest, computation, see INTEREST, 2.

BONDS:
For deed, evidence as to surrender, see VENDOR AND PURCHASER, 8.
For deed, whether passes after-acquired title, see DEEDS, 3.
Indemnity bonds, see INDEMNITY.
Parties plaintiff on joint bond, see NEW TRIAL, 1.
To protect laborers, see RAILROADS, 1.

BONDS—CONTINUED.

1. BONDS—INJUNCTIONS—ACTION UPON—PREVENTING CUTTING OF TIMBER—RIGHT TO CUT—NONSUIT. In an action upon an injunction bond for damages sustained by reason of an order temporarily restraining the cutting of timber on certain lands, a nonsuit is properly granted, where the complaint alleged that the plaintiff was engaged in cutting timber as it lawfully might do, and where it was denied that the plaintiff had any right so to do, and no evidence was offered of any right in the plaintiff to cut such timber. *White Pine Lumber Co. v. Aetna Indemnity Co*..... 569

2. SAME—ATTORNEY'S FEES—COSTS—WHEN NOT COVERED BY BOND. In an action upon an injunction bond, given upon show cause orders temporarily restraining the cutting of timber, the plaintiff cannot recover for the fees of attorneys employed in the matter, where their efforts were directed against the issuance of an injunction *peniente lite*, and no motion was made to dissolve the temporary orders; nor could the usual costs of the action be recovered as an expense growing out of the orders and covered by the bond. *Id*..... 569

BOUNDARIES:

1. BOUNDARIES—ADJOINING LANDOWNERS—LOCATION OF DIVISION LINE BY MISTAKE—ADVERSE POSSESSION—LIMITATION OF ACTIONS. Where adjoining landowners, without actual survey, locate a division line and jointly build a fence thereon believing it to be the true line, and occupy, cultivate and exercise exclusive dominion over the land up to such place, acquiescing in such location for over twenty years, it must be taken as the true boundary; and an action to recover to the true line on discovery of a mistake in the location is barred by the statute of limitations. *Lindley v. Johnston*..... 257

BREACH:

Of conditions, pleading, see INSURANCE, 2.
Of contract, see CONTRACTS, 3, 4.

BRIBERY:

Attempt to bribe juror, see NEW TRIAL, 3.

BRIDGES:

As special benefit to property, see MUNICIPAL CORPORATIONS, 21, 22.

BROKERS:

1. BROKERS—CONTRACTS FOR COMPENSATION—RESCISSION FOR FRAUD OF AGENTS—EQUITY. One who has availed herself of the services of real estate agents in the purchase of property, resulting in large profits, is not entitled to rescission of a contract to compensate the agents by dividing the profits by reason of the constructive fraud of the agents unless she first do equity by giving the agents a reasonable compensation for the services performed by them. *Hanna v. Haynes*..... 284

BROKERS—CONTINUED.

SAME—CONSTRUCTIVE FRAUD—EVIDENCE—SUFFICIENCY. Where real estate brokers, who have been acting as confidential agents of a client, purchase certain property for her, representing that the owner is unwilling to pay any commissions, and agree in lieu of commissions to effect a resale and share equally in the profits, it is a constructive fraud upon the client for the brokers to accept part of the commissions paid by the owners, warranting a court of equity, in the interest of public policy, in cancelling the contract to share the profits on a resale; and the burden of proof being upon the brokers to establish the fairness of the transaction, findings establishing constructive fraud will not be disturbed on appeal in the absence of satisfactory proof. *Id*..... 284

BUILDING CONTRACTS:

Requirement for written notice of default, see CONTRACTS, 4.

BURDEN OF PROOF:

Upon confidential agents, see BROKERS, 1.

BURGLARY:

Information, see CRIMINAL LAW, 3.

CANCELLATION OF INSTRUMENTS:

Of contract for fraud, see BROKERS, 2.
Of tide land lease, see PUBLIC LANDS, 5.
Rescission of contracts, see VENDOR AND PURCHASER, 7.

CARRIERS:

Damages sustained by passenger, see DAMAGES, 6.

1. CARRIERS—OF GOODS—BILL OF LADING. Where the receiving carrier issues a bill of lading for goods to be shipped beyond its line and the consignor delivers the same to an agent of an intermediate carrier who issues a bill of lading upon which the goods were shipped, such intermediate carrier makes itself an original carrier and its bill of lading stands for the contract between the consignor and the carrier. *Allen & Gilbert-Ramaker Co. v. Canadian Pac. R. Co.*. 64
2. SAME—LOSS OF GOODS—NEGLIGENCE OF CONNECTING LINE—LIABILITY OF ORIGINAL CARRIER. A common carrier to which goods are consigned and which issues to the shipper an original bill of lading for the carriage of the goods to a point beyond its own line, is responsible for the delivery of the goods and liable for damages thereto after the goods have left his own line. *Id*..... 64
3. SAME—BILL OF LADING—CONSTRUCTION—EXEMPTION FROM LIABILITY. A statement printed in fine print in the bill of lading issued by a carrier for the transportation of goods to a point beyond its own line, to the effect that in case of any loss or damage to the property

CARRIERS—CONTINUED.

during such transportation the carrier alone shall be held responsible therefor in whose custody the goods might be at the time, does not constitute a contract between the parties exempting the original carrier from responsibility for damages done while in the hands of connecting carriers, especially if such bill of lading is given after the delivery of the goods by the shipper. *Id*..... 64

4. CARRIERS—BILL OF LADING—AUTHORITY OF AGENT TO ISSUE. The agent of a railway company has no authority to issue a bill of lading for goods to be transported unless the goods have been actually received, even as to an innocent transferee of the bill of lading. *Roy & Roy v. Northern Pac. R. Co*..... 572

5. SAME—ESTOPPEL TO DISPUTE AUTHORITY. A railway company is not estopped to dispute the authority of its agents to issue bills of lading without the actual receipt of any goods for transportation, and a purchaser without knowledge of the facts respecting the agent's authority takes a bill of lading at his own risk. *Id*.... 572

6. SAME—NEGOTIABILITY. Bal. Code, § 3598, makes bills of lading negotiable for the purpose of transferring the title to the goods actually represented thereby, but not in the sense that bills and notes are negotiable and proof against defenses in the hands of *bona fide* purchasers. *Id*..... 572

7. SAME — DEFENSES — FRAUDULENT ISSUE. Where no goods have actually been received for shipment, the carrier may show that a bill of lading has been fraudulently or erroneously issued, as a defense against liability to a *bona fide* purchaser or holder. *Id*.... 572

8. SAME—PLEADING—ANSWER. It is not necessary to plead a defense to liability upon a bill of lading when all the facts constituting the defense appear on the face of the complaint. *Id*.... 572

9. CARRIERS — NEGLIGENCE — PASSENGERS — BOARDING STREET CAR IN MOTION—NONSUIT. In an action for death resulting from personal injuries received by a passenger in attempting to board a street car, there is no evidence of negligence on the part of the defendant, and a nonsuit is properly directed, where it appears that the car had stopped to take on passengers waiting at the far crossing, and that the deceased approached from the rear and attempted to board the rear platform as the car was starting, there being no evidence that the conductor saw, or by the exercise of reasonable care, should have seen, that he was intending to board the car. *Woodman v. Seattle Electric Co*..... 406

CATTLE STEALING:

Evidence, variance, see CRIMINAL LAW, 25.

CERTIORARI:

1. CERTIORARI TO REVIEW AN ORDER IN CONDEMNATION PROCEEDINGS—TIME FOR TAKING. Under Bal. Code, § 5645, restricting appeals in condemnation cases to thirty days, an application for a writ of certiorari to review the determination of public use or necessity is limited to a period of thirty days after the entry of the order, where no showing is made of special circumstances to excuse the delay and want of diligence (FULLERTON, J., dissenting). *State ex rel. Alexander v. Superior Court*..... 684

CHARTER:

Of municipal corporations, see MUNICIPAL CORPORATIONS, 1-5.

CHATTEL MORTGAGES:

1. CHATTEL MORTGAGES—RECORDING—REMOVAL TO ANOTHER STATE—CONSENT OF MORTGAGEE. The rule that a chattel mortgage, valid and recorded at the situs of the property, imparts notice to third persons after the removal of the property to another state, has no application where the mortgagee consented to such removal, the same amounting to a waiver of the mortgage except as to the mortgagor. *Jones v. North Pacific Fish & Oil Co*..... 332

2. SAME—POSSESSION OF MORTGAGE—UNAUTHORIZED ACT OF INSOLVENT CORPORATION. A mortgagee, who obtains possession of the property through the unauthorized acts of the officers of the mortgagor, an insolvent corporation, can thereby obtain no preference over other creditors who were not bound by notice of the mortgage. *Id*.... 332

CHILD:

See ADOPTION; GUARDIAN AND WARD; INFANTS.

CHURCH:

See RELIGIOUS SOCIETIES, 1.

CHOSE IN ACTION:

Is property, see GUARDIAN AND WARD, 2.

CITIZENS:

Privileges and immunities, see CONSTITUTIONAL LAW, 4.

CLAIMS:

Against city for personal injuries, see MUNICIPAL CORPORATIONS, 30.
Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 5, 6.

COLLISION:

Of street cars, see MASTER AND SERVANT, 8, 9

COLLECTION:

Authority to make, see PRINCIPAL AND AGENT, 1.

COLOR OF TITLE:

To sustain adverse possession, see ADVERSE POSSESSION, 3.

COMMERCE:

Restrictions of license fee on nonresidents, see CONSTITUTIONAL LAW, 3.

COMMISSIONERS:

Right to appeal from, see MANDAMUS, 1.

COMMISSIONS:

Of broker, see BROKERS.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE, 2, 3.
Priority of liens upon, see MORTGAGES, 2.

COMPETENCY:

Of witnesses, see WITNESSES, 1.

COMPLAINT:

In civil actions, see PLEADING.
In criminal prosecutions, see CRIMINAL LAW, 1-5.

COMPROMISE AND SETTLEMENT:

See ACCORD AND SATISFACTION.
Of pending suit, effect of default, see ACTIONS, 2.
Settlements in divorce, out of court, see DIVORCE, 2.

COMPUTATION:

Of interest, see INTEREST, 2.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN.

CONDITIONS:

In insurance policies, see INSURANCE, 1, 2.
Subsequent, in deed, see DEEDS, 4.
Subsequent, recovery for breach, see EJECTMENT, 1.

CONFESSION:

Admissibility, see CRIMINAL LAW, 7, 8.

CONFLICT OF LAWS:

Note and mortgage of another state, see USURY, 1, 2.

CONSIDERATION:

For subscription, see SUBSCRIPTION, 1.
Of contract, see CONTRACTS, 2.

CONSPIRACY:

Information, see CRIMINAL LAW, 4.

CONSTITUTIONAL LAW:

See COURTS, 1; EMINENT DOMAIN.
Delegation of legislative power, elections, see MUNICIPAL CORPORATIONS, 5.
For establishment of drains, see DRAINS, 1.
Right to appear and defend, see CRIMINAL LAW, 18.
Subjects and titles of statutes, see STATUTES, 1-3.

1. CONSTITUTIONAL LAW—MANDAMUS. The constitutionality of a law may be raised in mandamus proceedings by ministerial officers proceeded against for its nonenforcement or for noncompliance therewith. *Hindman v. Boyd*..... 17

2. CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS—CHARTER AMENDMENTS—EXPENSE OF SUBMISSION—IMPOSITION OF TAX. Laws 1903, p. 393, requiring the municipal authorities to submit to a vote of the people a charter amendment when petitioned so to do by fifteen persons of the qualified voters of the city, thereby compelling the city to incur the expense of such election, is not unconstitutional as imposing a tax upon cities, within the purview of Const., art. 11, § 12, since the constitutional prohibition against the legislature's imposing taxes upon municipalities cannot be held to relate to the expense of such an election thereby preventing the people from exercising a fundamental power, which may be exercised in the manner provided by general laws. *Id*..... 17

3. CONSTITUTIONAL LAW—COMMERCE—DISCRIMINATION AGAINST CITIZENS OF OTHER STATES. Laws 1905, p. 372, providing that every person who canvasses or sells by sample certain specified articles "after shipment to the state," shall pay in advance a license fee of $200 per year, violates the state and Federal restrictions against discrimination between citizens of this and other states, and is unconstitutional. *Bacon v. Locke*..... 215

4. CONSTITUTIONAL LAW — CIVIL RIGHTS — LICENSING OF PLUMBERS. Laws 1905, p. 126, regulating the business of plumbing and requiring plumbers to secure a license from an examining board cannot be sustained as a health regulation, and infringes the state and Federal constitutions by depriving them of the pursuit of happiness and liberty to pursue their chosen calling. *State ex rel. Richey v. Smith*..... 237

5. DRAINS—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE AUTHORITY. The drainage act, Bal. Code, § 3726, Laws 1895, p. 281, § 12, requiring the superior court to find that a proposed ditch is practicable and conducive to the public health and will increase the

CONSTITUTIONAL LAW—CONTINUED.

value of the lands, is not unconstitutional as a delegation of legislative authority; since the court does not originate or devise the system or plan but simply approves those proposed by the county commissioners. *State ex rel. Matson v. Superior Court*..... 491

CONTINUANCE:

1. TRIAL—CONTINUANCE—ABSENT WITNESS. Abuse of discretion is not shown in refusing a continuance of a trial for a balance due on a sale, asked for on account of the illness and absence of the defendant, who resided in New York, where his deposition might have been taken, the action had been pending for many months and two or more continuances had been granted at defendant's request. *Puget Sound Machinery Depot v. Brown Alaska Co*..... 681
2. CONTINUANCE—RIGHT TO—INSTRUCTIONS. Upon an issue as to whether a person not a party to an action could have obtained a continuance of the trial, it is proper for the court to instruct that the granting of a continuance is largely discretionary, and may be exercised in favor of the real defendant, although not a party of record, when the requirements of justice demand it. *Spokane v. Costello* 182
3. CONTINUANCE—TO SECURE DEPOSITIONS—DIVORCE. In an action for a divorce, brought by a wife against her husband while in the Philippines, it is error, where the defendant appears to have a defense, to refuse him a continuance for a sufficient length of time to enable him to obtain a deposition and have it returned here in time for the trial. *Hill v. Hill*..... 250

CONTRACTORS:

As parties to assessment procedure, see MUNICIPAL CORPORATIONS, 13.
Bonds to protect laborers, see RAILROADS, 1.
Liens, see MECHANICS' LIENS.

CONTRACTS:

See ACCORD AND SATISFACTION; BONDS; INDEMNITY; INSURANCE; MASTER AND SERVANT, 1; SALES; SUBSCRIPTIONS, 1.
Agency, see PRINCIPAL AND AGENT.
Agreements within statute of frauds, see FRUADS, STATUTE OF.
Bills of lading, see CARRIERS, 1-8.
Constitutional guaranty of liberty to contract, see CONSTITUTIONAL LAW, 3, 4.
Construction, joint owner of lands, see ACCOUNT, 1.
Copy of as evidence, see EVIDENCE, 1.
Extending period of redemption, construction, see MORTGAGES, 6-8.
Of indemnity, discharge of surety, see PRINCIPAL AND SURETY.
Made in another state, see USURY, 1, 2.
Mutuality, specific performance, see VENDOR AND PURCHASER, 11.
Performance, evidence of, see MECHANICS' LIENS, 1.

CONTRACTS—CONTINUED.

Rescission for fraud, see BROKERS, 1, 2.
Sales of realty, see VENDOR AND PURCHASER.

1. CONTRACTS—NOTE EXECUTED IN ANOTHER STATE—VALIDITY. The fact that a binding contract between citizens of another state, valid by the laws of such state, is secured by a mortgage upon real property in this state, does not render the contract subject to the usury laws of this state, or prevent the enforcement of the same here, on the theory that the usury law affects only the remedy. *Bank v. Doherty*..... 317

2. CONTRACTS—CONSIDERATION AND MUTUALITY. A contract to supply goods on the one hand, and on the other hand to sell the same exclusively and work up a market for them, is not void for want of mutuality or consideration. *Federal Iron and Brass Bed Co. v. Hock*..... 668

3. CONTRACTS—BREACH—PROSPECTIVE PROFITS. In an action upon notes given for credit extended under a contract whereby the plaintiff was to supply certain goods on credit, and the defendant agreed to sell the plaintiff's goods exclusively in a certain territory until a certain date, the defendant may plead a breach of the contract by plaintiff's refusal to deliver the goods, and may counterclaim for damages for his future profits under the contract, where he had expended money in opening a market for the goods. *Id*..... 668

4. CONTRACTS — PERFORMANCE — WRITTEN NOTICE OF BREACH — EVIDENCE—ORAL OBJECTIONS—ADMISSIBILITY. Upon an issue as to the due performance of a building contract, evidence that the owner made oral objections during the progress of the work as to the manner of performance is inadmissible, where the contract provided that the owner could condemn by written notice any part of the work, which should thereupon be removed by the contractor, and that no such written notice was given. *Sweatt v. Hunt*..... 96

5. CONTRACTS—EVIDENCE—VARYING WRITING BY PAROL. Where a written contract plainly recites that the first payment is to be deposited in a bank subject to the order of the first party, upon his part performance of a contract, and plainly advises the bank of its duty in the premises as to the payment, oral evidence is inadmissible as to what was said at the time the contract and money were delivered to the bank. *Pierson v. Peirce*..... 164

6. CONTRACTS—PAROL EVIDENCE TO VARY WRITING—FRAUD. Evidence of conversations prior to the making of a written contract is admissible to vary or change the terms of the writing where it was received for the purpose of showing fraud in drawing up the contract and stating the terms agreed upon. *Lilienthal v. Herren*.. 209

7. CONTRACTS—RESCISSION—PERFORMANCE — EVIDENCE — SUFFICIENCY. There is sufficient evidence to support findings of fact to the effect that a contract for the sale of mining property had been performed

CONTRACTS—CONTINUED.

by the vendor by offering a conveyance of sufficient title, where it appears that the vendees examined the papers, were perfectly satisfied, and took possession and worked the property until ordered out for failure to make payments due on the contract. *Pierson v. Peirce*..... 164

8. CONTRACTS—SERVICES—TRIAL—VERDICT—COMPUTATION OF AMOUNT. In an action to recover for services performed, in which the principal controversy was as to a modification of the terms of the contract, whereby the plaintiff's wages were reduced from $35 to $25 per week after a certain date, making the balance due thereon either $111.65 or $257, a verdict for the sum of $217, is justified where there was evidence from which the jury might have computed the amount by reference to a different time than that specified as the time of the modification, or might have considered certain allowances for room rent in consideration of the modification of the contract. *Quarles v. Frederick*..... 117

CONTRIBUTION:

Promises to contribute, see SUBSCRIPTIONS, 1.

CONTRIBUTORY NEGLIGENCE:

Of fellow servant, see MASTER AND SERVANT, 7-9.
Of servant, see MASTER AND SERVANT, 13.
Of traveler by team, see MUNICIPAL CORPORATIONS, 31, 32.

CONVEYANCES:

See CHATTEL MORTGAGES; MORTGAGES.

CORPORATIONS:

See RAILROADS; RELIGIOUS SOCIETIES, 1.
Acquisition of property by condemnation, see EMINENT DOMAIN, 3-9, 18.
Estoppel, verbal statements of officers, see DEEDS, 4.
License, failure to obtain, see EMINENT DOMAIN, 18.
Pledge of stock see PLEDGES, 1.
Public service corporations, see EMINENT DOMAIN, 4-9.
Ratification of oral sale, see VENDOR AND PURCHASER, 2.
Resolutions as contract or memorandum of sale, see FRAUDS, STATUTE OF, 3.
Unauthorized acts of officers of mortgagee, effect as to creditors, see CHATTEL MORTGAGES, 2.

1. CORPORATIONS—STOCKHOLDERS—SALES AND TRANSFERS UNDER MISREPRESENTATIONS—RIGHTS OF COMPANY. Where certain shares of treasury stock in a mining corporation were issued in payment of services rendered and to be rendered in promoting and advertising the company, and the contract is thereafter fully performed by the stockholder, the stock is his property, and the fact that he sells the

CORPORATIONS—CONTINUED.

same under misrepresentations to the effect that the same is treasury stock and that the proceeds are to be used in the development of the mine, does not render him liable to account to the corporation as for sales of treasury stock belonging to the company or otherwise, since the misrepresentations did not concern the company or anyone except the vendees. *Chilkat Gold & Copper Mining Co. v. Fos*..... 201

2. CORPORATIONS — INSOLVENCY — ACTION BY RECEIVER — CREDITOR'S KNOWLEDGE OF INSOLVENCY—SETTING ASIDE EXECUTION. In an action by a receiver of an insolvent corporation to set aside an attachment and execution in favor of a creditor, it is not necessary to allege that the creditor knew the corporation to be insolvent at the time of the commencement of the action, where the corporation was in fact insolvent at the time the attachment was sued out; since its assets thus became a trust fund for creditors. *Allen v. Baxter*..... 434

COSTS:

Failure to pay after voluntary dismissal, stay of second action, see ACTIONS, 3.

In criminal case, see CRIMINAL LAW, 1.

Not covered by injunction bond see BONDS, 2.

On appeal, see APPEAL AND ERROR, 25.

COUNTERCLAIM:

Against administrator, see EXECUTORS AND ADMINISTRATORS, 5, 6.

COURTS:

Condemnation proceedings, see EMINENT DOMAIN.

Establishment of drains, see CONSTITUTIONAL LAW, 4; DRAINS, 1.

Jurisdiction, see RELIGIOUS SOCIETIES, 1.

Jurisdiction of action by foreign guardian, see GUARDIAN AND WARD, 1.

Province of court and jury, see TRIAL, 2.

Review of decisions, see APPEAL AND ERROR.

Review of assessment of tax, see TAXATION, 2.

1. COURTS—SESSIONS—VISITING JUDGES. Under Const., art. 4, § 7, a visiting judge of the superior court may hold a session of the court at the request of a resident judge, without any request by the governor, and although all of the resident judges are also holding sessions in the same county at the same time. *Hindman v. Boyd*.. 17

CREDIBILITY:

Of witnesses, see WITNESSES, 3.

CREDITORS:

Of insolvent corporation, assets a trust fund, see CORPORATIONS, 2.

CRIMINAL LAW:

I. INFORMATION AND DEFINITIONS.

1. CRIMINAL LAW—INFORMATION—LOSS AND SUBSTITUTION—COSTS. Where an information is lost, the substitution of a new information at the trial, which is given a new case number, is not an institution of a new prosecution, and it is not error to tax against the defendant the costs of the original proceeding. *State v. McFadden*..... 1

2. CRIMINAL LAW—ASSAULT—THREATS. A person may be guilty of assault and battery where he advances toward another threatening to "put him out of his misery," and at the same time deliberately drawing a revolver from his pocket which is taken from him by the bystanders after some considerable effort; and the question of his guilt or innocence is one for the jury. *Id*..... 1

3. BURGLARY—INFORMATION—CHARGE IN LANGUAGE OF STATUTE. An information charging the crime of burglary in the language of the statute defining the crime as an unlawful entry with intent to commit a crime "or" misdemeanor, is sufficient, especially in view of the statute providing that the information may allege in the alternative the different means by which an act was committed. *State v. Lewis*..... 672

4. CRIMINAL LAW—CONSPIRACY—INFORMATION—SUFFICIENCY. An information sufficiently charges a conspiracy to defraud when it alleges that two persons conspired to cheat and defraud a person of a certain sum of money, particularly setting forth the acts and things done pursuant thereto. *State v. Hillman*..... 615

5. CRIMINAL LAW—LARCENY—INFORMATION—DUPLICITY. An information charging the larceny of fence posts upon a certain day, part of which belonged to one person and part to another, is not subject to demurrer for duplicity, where the natural inference from the language used is that they were all taken and carried away at the same time. *State v. Butts*..... 455

II. EVIDENCE.

6. CRIMINAL LAW — ASSAULT — EVIDENCE — ADMISSIBILITY. Upon a prosecution for an assault made by advancing upon the prosecuting witness and drawing a revolver, evidence that the defendant on the day after the occurrence stated that he "mighty near killed" the prosecuting witness, is admissible upon the issue as to whether the violence was only menaced or was actually begun. *State v. McFadden*..... 1

7. CRIMINAL LAW—EVIDENCE—ADMISSIONS—SHOWING COMMISSION OF OTHER CRIMES. Admissions and confessions tending to show that the defendant was guilty of the crime charged, viz., living off the earnings of a prostitute, are not objectionable on the ground that they show the commission of other crimes, viz., vagrancy and lar-

CRIMINAL LAW—CONTINUED.

ceny, when such fact appears only as an incident and because admissions were made during the progress of the prosecutions for such other offense. *State v. Poole*..... 192

8. SAME—VOLUNTARY CONFESSIONS The confession of the accused made to officers while under arrest and during prosecutions for other offenses, are admissible, if voluntary and not made under the influence of fear produced by threats. *Id*..... 192

9. HOMICIDE—ASSAULT WITH INTENT TO KILL—EVIDENCE—EXTENT OF WOUND. In a prosecution for assault with intent to kill by shooting, it is not prejudicial error to permit the prosecuting witness to show the character and extent of the wound by stating how long he was under the doctor's care. *State v. Weisenberger*..... 426

10. SAME—HEARSAY EVIDENCE—DRAWN OUT IN CROSS-EXAMINATION—HARMLESS ERROR. In a prosecution for an assault with intent to kill, the accused cannot complain of the hearsay statement of a witness that she had been told that the accused said he would shoot, when the same was drawn out by counsel for the accused in answer to a question as to why the witness made the statement that the accused was trying to shoot. *Id*..... 426

11. SAME—EVIDENCE OF INTENT—COMPETENCY. In a prosecution for assault with intent to kill, the fact that the accused had insulted the daughter of the prosecuting witness the night before, and had threatened to shoot in case she reported the matter, is material to show intent in drawing the revolver and shooting when called out by the prosecuting witness. *Id*..... 426

12. CRIMINAL LAW—DYING DECLARATIONS—KNOWLEDGE OF IMPENDING DEATH. A dying declaration is sufficiently shown to have been made in the realization of impending death where the doctor in attendance informed deceased that he was about to die, and the deceased stated that he realized it. *State v. Mayo*..... 540

13. SAME—FAILURE TO IDENTIFY ACCUSED—ADMISSIBILITY. A dying declaration is not inadmissible because it failed to identify the accused, where it adds a link in the chain of evidence and made it possible to identify the person who committed the crime. *Id*... 540

14. SAME—IMPEACHMENT—INCONSISTENT STATEMENTS—ADMISSIBILITY. A dying declaration may be impeached by showing other statements inconsistent therewith. *Id*..... 540

15. SAME—METHOD OF IMPEACHMENT. In a prosecution for homicide, it is error to require the defendant, in offering evidence of statements by the deceased which were inconsistent with his dying declaration, to introduce them after the manner of impeaching evidence; but he is entitled to ask the witness directly what statements were made by the deceased. *Id*..... 540

16. SAME—EVIDENCE—NOTICE OF NAME OF PARTY DEFRAUDED. Where persons conspire to defraud whomsoever may be entrapped by their

CRIMINAL LAW—CONTINUED.

schemes, it is not necessary to prove that any particular person was in their minds at the time. *State v. Hillman*..... 615

III. TRIAL—INSTRUCTIONS.

Substitution for lost information, see CRIMINAL LAW, 1.

17. JURORS—CRIMINAL LAW—ACCUSED'S RIGHT TO DEMAND LIST. Bal. Code, § 6879, providing that an accused shall on demand be served with a list of the petit jurors returned, does not entitle him to be tried by a jury selected solely from the names so returned, nor to demand that such list be exhausted before a special venire be issued, where part of such jurors are in attendance upon another department of the court. *State v. Mayo*..... 540

18. CRIMINAL LAW—RIGHT TO APPEAR AND DEFEND—LIMITING ARGUMENT TO JURY—ABUSE OF DISCRETION. In a capital case in which twenty witnesses were examined and four days were consumed in the trial, it is an infringement of the constitutional right of the accused to appear and defend, and an abuse of discretion, to limit the time for argument to the jury to an hour and a half on each side. *Id*..... 540

19. VENUE—PREJUDICE—SENSATIONAL NEWSPAPER ARTICLES AND ASSOCIATION TO CREATE PUBLIC SENTIMENT. Where public sentiment has been aroused in the community by sensational newspaper articles, and by an association organized for the purpose of creating public sentiment against the accused, to such an extent that it appears that they cannot have a fair trial, it is error to refuse to grant a change of venue. *State v. Hillman*..... 615

20. TRIAL—INSTRUCTIONS. It is not error to refuse proper instructions covered in the general charge. *State v. Wilson*..... 56

21. SAME—ACCIDENTAL SHOOTING—INSTRUCTIONS NOT REQUESTED. In a prosecution for assault with intent to kill, error cannot be predicated upon the failure of the court to instruct the jury on the theory of an accidental discharge of the revolver during a struggle, where no instructions thereon were requested. *State v. Weisenberger*. 426

22. CRIMINAL LAW—INSTRUCTIONS—PRESUMPTION OF INNOCENCE. In a criminal case it is the duty of the court to instruct the jury as to the presumption of the innocence of the accused. *State v. Mayo*. 540

23. SAME—DYING DECLARATIONS—INSTRUCTIONS. It is error to refuse to instruct that the dying declarations should be received with caution. *Id*..... 540

24. TRIAL—INSTRUCTIONS—WHEN REQUIRED IN WRITING. Under Laws 1903, p. 120, subd. 4, requiring the court, upon request, to instruct the jury in writing, unless the same is taken by the stenographic reporter, the employment of a private reporter who is not subject to the control of the court will not excuse the failure to instruct in writing. *Id*..... 540

CRIMINAL LAW—CONTINUED.

25. CRIMINAL LAW—LARCENY—VARIANCE—PROOF OF POSSESSION. Upon a prosecution for the larceny of cattle running upon the range, under Bal. Code, § 7114, providing that the possession of such cattle shall throw upon the accused the burden of explaining such possession, evidence that the cattle were found in the defendants' field, marked and branded with their mark and brand, is sufficient proof of possession to sustain a conviction under such section; and the fact of the marking and branding, which is a distinct offense under the statute, does not constitute a variance; since the same was competent upon the question of the intention to commit the larceny charged. *State v. Wilson*..... 56

26. CRIMINAL LAW—LIVING OFF THE EARNINGS OF A PROSTITUTE—INSTRUCTIONS. In a prosecution for living off the earnings of a prostitute, it is not error prejudicial to the defendant for the court in its instructions to the jury, to impose upon the state the additional burden of proving that the defendant had lived with a prostitute, especially where the jury are expressly instructed that living with a prostitute would not constitute the offense charged. *State v. Poole*..... 192

CROSS-EXAMINATION:

See WITNESSES, 3.

DAMAGES:

By change of grade, see MUNICIPAL CORPORATIONS, 6-8.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 15, 19-21.

For local improvement, deduction of benefits, see MUNICIPAL CORPORATIONS, 8, 21-24.

For personal injuries, see MUNICIPAL CORPORATIONS, 30-32.

For trespass in exercise of governmental function, see MUNICIPAL CORPORATIONS, 33.

Prospective profits on breach of contract, see CONTRACTS, 3.

To rights of littoral owners, see WATERS.

Unlawful detainer of demised premises, see LANDLORD AND TENANT, 5.

1. DAMAGES—VALUE OF SERVICES—EVIDENCE—ADMISSIBILITY. In an action for damages for personal injuries sustained by a mail clerk, whose employment and promotion depends upon fixed civil service rules, it is competent to show the salaries to which he would be entitled upon promotion, upon the issue as to his earning capacity. *Williams v. Spokane Falls & N. R. Co*..... 597

2. DAMAGES—DEFENSES—CLAIM OF SIMULATION—ATTEMPTS AT SETTLEMENT IN REBUTTAL. In an action for personal injuries in which the defense claims that the plaintiff was not much injured, but was simulating "hysterical paralysis," evidence on the part of the

DAMAGES—CONTINUED.

plaintiff of repeated visits by the defendant's claim agent, in an endeavor to secure a settlement, is admissible in rebuttal. *Id.*. 597

3. DAMAGES—FOR PERSONAL INJURIES—MEDICAL ATTENDANCE—FUTURE EXPENSES—INSTRUCTIONS. There is sufficient evidence to support an instruction that the jury, in assessing the damages to one who was severely injured, could take into consideration any expense for medicine and care of physicians, necessarily incurred, or that the plaintiff may in the future with reasonable probability be put to, where it appeared that physicians had been employed and attended, and that the plaintiff had not recovered and would continually suffer from permanent injuries, although the amount paid or the value was not shown. *Webster v. Seattle etc. R. Co*..... 364

4. SAME—MEDICAL ATTENDANCE—LIMITING TO AMOUNT ALLEGED. In an action for personal injuries, an instruction limiting the recovery for medical services and loss of time to the amount alleged in the complaint is not erroneous as a suggestion that there was sufficient evidence to warrant findings for such sums. *Cole v. Seattle etc. R. Co*..... 462

5. SAME—PROBABLE LOSS OF TIME AND FUTURE EXPENDITURES. An instruction is proper allowing the jury, in assessing damages for personal injuries, to take into consideration the probable loss of time and expenditures that plaintiff will be put to in the future, where the expert witnesses testify that further medical attendance would probably be necessary; and the same is not objectionable because not expressly limited to expenditures that are reasonably necessary. *Id*..... 462

6. DAMAGES—PERSONAL INJURIES—INSTRUCTIONS—OBJECT OF RIDICULE—HARMLESS ERROR. In an action for personal injuries sustained by a passenger, where liability for serious injuries and impairment of hearing is admitted by the defendant, argumentative instructions to the effect that the defendant would be liable for damages if the plaintiff was rendered an object of ridicule or deprived of the companionship of his fellows, is not prejudicially erroneous, although there was no evidence warranting the same, where the jury saw and heard the plaintiff upon the witness stand, and could therefore judge whether any such conditions existed. *Id*..... 462

7. SAME—PERMANENT IMPAIRMENT OF MENTAL FACULTIES. An instruction allowing damages for permanent impairment of mental faculties is warranted where the evidence tended to show permanent impairment of health, lack of mental vigor and control, and inability to give intelligent and consecutive attention to business, never experienced prior to the accident, and consequent decrease in earning power. *Id*..... 462

DAMAGES—CONTINUED.

8. DAMAGES — EXCESSIVE VERDICT FOR WRONGFUL EVICTION — MENTAL ANGUISH. A verdict in the sum of $2,000 for loss and damage to goods and mental anguish from a wrongful eviction is excessive, and should be reduced to $1,000, where the trial court found that the same was excessive, and where the damage to the goods did not exceed $740, and it appears that most of the distress of the plaintiffs arose from the loss to the property, which remained in the street, guarded by them, for one night, and they suffered slight inconvenience for only a few days. *McClure v. Campbell*..... 252

9. DAMAGES—EXCESSIVE VERDICT. A verdict for $20,000 damages for personal injuries, resulting in the amputation of a leg at the knee, sustained by a longshoreman, thirty-nine years of age, capable of earning from fifty to seventy dollars a month, is excessive, and should be reduced to $14,000. *Melse v. Alaska Commercial Co.*. 356

10. DAMAGES—EXCESSIVE VERDICT. A verdict for $5,000 damages for the loss of a foot, sustained through the malpractice of a physician, is not excessive, where it appears that the plaintiff, a common laborer, was forty-four years of age, with an expectancy of life of twenty-six years; and such a case is not to be distinguished from the ordinary personal injury case in assessing the amount of the damages. *Froman v. Ayars*..... 385

11. DAMAGES—EXCESSIVE VERDICT—PARTIAL PARALYSIS. A verdict for $33,000 damages for injuries sustained by a mail clerk, a young man, resulting in partial paralysis, is excessive, and should be reduced to $20,000 (DUNBAR, J., dissenting). *Williams v. Spokane Falls & N. R. Co*..... 597

12. DAMAGES—EXCESSIVE VERDICT—LOSS OF ENDS OF FINGERS. A verdict for $5,000 damages for the loss of the ends of three fingers of the right hand and the stiffening of the joints of the thumb is excessive, and should be reduced to $3,500. *Kirby v. Wheeler-Osgood Co*..... 610

DANGER:

Master's duty to warn servant, see MASTER AND SERVANT, 2, 6.

DANGEROUS PREMISES:

See NEGLIGENCE, 3.

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.

DECLARATIONS:

As evidence in criminal prosecutions, see CRIMINAL LAW, 6, 12-15.

DEEDS:

Absolute deed as mortgage, see MORTGAGES, 5.
By agent, see QUIETING TITLE, 1.
Oral evidence of contents, see REPLEVIN, 2.
Tax deeds, see TAXATION, 3.

1. DEEDS — RECITALS AS TO HEIRSHIP — EVIDENCE — COMPETENCY. A deed reciting that the grantors are the sole heirs at law of the person who died seized of the land described is not competent evidence of that fact without proof of such heirship, as against one holding adversely to the grantee in the deed. *Lohse v. Burch*.. 156

2. SAME—PRESUMPTIONS—ANCIENT DEEDS. The rule as to the presumption of the authenticity of recitals in an ancient deed cannot be applied to a deed made sixteen years prior to the commencement of the action, reciting that the creditors are heirs at law of the person who died seized of the premises, where lapse of time alone is relied upon without proof of the surrounding circumstances. *Id*. 156

3. DEEDS—BOND FOR DEED—AFTER-ACQUIRED TITLE. A bond for a deed, made by a patentee prior to the issuance of a patent, is not a conveyance, and is insufficient to pass an after-acquired title. *Turner v. Ladd*..... 274

4. DEEDS—CONDITION SUBSEQUENT—WAIVER—ESTOPPEL OF CORPORATION BY STATEMENTS OF ITS PRESIDENT. The provision in deeds of a corporation, the owner of a townsite, that in case of the sale of intoxicating liquors thereon, the premises should revert to the grantor, cannot be waived by the verbal statements of the president of the corporation, published as informal statements of the policy of the corporation, and such statements will not operate as an estoppel against the corporation. *Lewiston Water etc. Co. v. Brown*.... 555

DEFAULT:

Under stipulation to dismiss action, see ACTIONS, 2.

DEFECT:

In street or sidewalk, see MUNICIPAL CORPORATIONS, 30-32.

DEMAND:

Before suit, see EJECTMENT, 1.

DEMURRER:

In pleading, see PLEADING, 1-7.

DEPOSITIONS:

Continuance of trial to take, see CONTINUANCE, 1, 3.

DESCENT AND DISTRIBUTION:

See EXECUTORS AND ADMINISTRATORS.

DIRECTING VERDICT:

In civil actions, see TRIAL, 2.

DISCHARGE:

From liability as partner, see PARTNERSHIP, 1.
From liability as surety, see PRINCIPAL AND AGENT, 1.

DISCONTINUANCE:

Of action, see DISMISSAL AND NONSUIT, 1.

DISCRETION OF COURT:

As to continuance, see CONTINUANCE, 2.

DISMISSAL AND NONSUIT:

At trial, see TRIAL, 2.
Failure to commence suit in time, see MECHANICS' LIENS, 3.
Of former actions, payment of costs, see ACTIONS, 3.

1. SAME—DISMISSAL—FAILURE TO PROSECUTE. The dismissal of an action for failure to prosecute it with diligence, entered on the 14th day after staying proceedings until the costs of a former action had been paid, is not error where the action had been pending two and one-half years and there was no showing that the appellant could not have paid the costs within such time. *Arthur v. Washington Water Power Co*..... 431

DITCHES:

See DRAINS.

DIVORCE:

1. DIVORCE—ABANDONMENT—EVIDENCE—SUFFICIENCY. The findings of the trial court in granting the husband a divorce on the ground of abandonment will not be disturbed on appeal where it appears that the wife refused to live with him, although often requested to do so, giving as a reason that he could not properly provide for her and that she did not feel safe by reason of his bad treatment of her; especially when the trial judge had the advantage of seeing the parties and witnesses. *Buell v. Buell*..... 277

2. DIVORCE—SETTLEMENT BY PARTIES—ATTORNEY'S FEES—NO RIGHT IN ATTORNEYS TO INTERVENE. Where a wife settles with her husband her action for a divorce, her attorneys cannot intervene in the suit and obtain judgment for their fees and costs advanced; Bal. Code, § 5722, requiring the husband to pay the reasonable expenses of the wife therein not applying; and it being the policy of the law not to discourage such settlements. *Hillman v. Hillman*..... 595

DRAINS:

Draining districts, obstruction to navigation, see WATERS, 5.
Establishment by court, see CONSTITUTIONAL LAW, 4.
Title of act, see STATUTES, 2.

1. DRAINS—PROCEEDINGS FOR ASSESSMENT. The drainage act of 1895 does not violate Const., art. 7, § 9, in that it imposes upon the court and jury the duty of making an assessment; since the assessment is made by the ditch commissioners after the jury determines the damages and the value of the land. *State ex rel. Matson v. Superior Court*..... 491

2. DRAINS — PETITION — SUFFICIENCY — DETAILED PLANS, SPECIFICATIONS AND ESTIMATES. A petition for the establishment of a drainage district and system of ditches, under the law of 1895, is insufficient where it contains no complete description of the proposed improvement, with detailed plans and specifications and draughts of necessary artificial appliances or equipment, or any estimate of the cost, all of which must appear with sufficient particularity to enable them to proceed by contracting for its construction without change or further plans and specifications. *Id*..... 491

3. DRAINS—PETITION—AMENDMENT. In proceedings for the establishment of a drainage district and ditches, it is proper to allow, upon notice, an amendment of the petition for the purpose of proposing a change in the system. *Id*..... 491

4. DRAINS—COMPLETION OF SYSTEM. The drainage act of 1895 requires the completion of any proposed system of drains with all expedition possible, and it is not competent to propose a complete system, only a portion of which is intended to be construed at the present time. *Id*..... 491

5. DRAINS—FEASIBILITY OF PLAN. The fact that some other plan would be more feasible does not deprive the court of jurisdiction to establish the system proposed. *Id*..... 491

6. DRAINS—DITCH COMMISSIONERS—BOND. The failure of ditch commissioners to qualify by filing a bond in the required amount, does not invalidate an assessment made by them as *de facto* officers. *Id*..... 491

DUE PROCESS OF LAW:

See EMINENT DOMAIN, 12, 19.

DUPLICITY:

Information, see CRIMINAL LAW, 4.

EJECTMENT:

Notice or demand, *res adjudicata*, see JUDGMENTS, 1.

1. EJECTMENT—RECOVERY FOR BREACH OF CONDITION SUBSEQUENT—DEMAND BEFORE SUIT. In an action to recover the possession of premises for the breach of a condition subsequent, it is not necessary to make a demand or entry, in view of Bal. Code, § 5500, changing the common law rule in this respect. *Lewiston Water etc. Co. v. Brown* 555

ELECTIONS:

For charter amendments, see MUNICIPAL CORPORATIONS, 1-5.

Compelling city to incur expense of election, see CONSTITUTIONAL LAW, 2.

ELECTRICITY:

Use of water for generating power, see EMINENT DOMAIN, 7-9.

EMINENT DOMAIN:

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 9-27.

Review by certiorari, time for applying, see CERTIORARI, 1.

1. EMINENT DOMAIN—PUBLIC USE—STREETS—LAND OWNED BY CITY—ESTOPPEL. It cannot be claimed that the taking of land by a city for the extension of a public street is not a public use because of the fact that the city already owns certain land necessary to complete the extension, and which has not been formally dedicated and is not mentioned in the proceedings; since the city would be estopped to claim that its land necessary therefor was not to be used or dedicated. *State ex rel. Thomas v. Superior Court*..... 521

2. SAME—PUBLIC USE. The use of property for a public street is necessarily a public use. *Id*..... 521

3. SAME—PUBLIC USE—CREATION OF POWER FOR USE OF STREET RAILWAY. Under Laws 1903, p. 366, authorizing street railway companies to condemn land for right of way "and other corporate purposes," a street railway company may condemn land not adjacent to its right of way, for the purpose of developing a water power to create the power for the system, the public being directly interested in such use as a means of acquiring cheap transportation. *State ex rel. Harlan v. Centralia-Chehalis etc. Power Co*..... 632

4. SAME—PUBLIC NECCESSITY—EVIDENCE—SUFFICIENCY. The uncontradicted testimony of the president of a street railway company to the effect that all the power that could be developed by a proposed dam would be required for the uses of the company is sufficient proof that there was a necessity for the taking of the land sought. *Id*..... 632

EMINENT DOMAIN—CONTINUED.

5. SAME—CONDEMNATION FOR PUBLIC USES BY CORPORATION ORGANIZED FOR PUBLIC AND PRIVATE PURPOSES. A street railway company, organized for purposes partly private and partly public, may acquire land by the right of eminent domain where the proceedings show that the power is exercised only for its use as a common carrier, and which are not so combined with its private purposes as to be inseparable. *Id.*..... 632

6. EMINENT DOMAIN—PUBLIC USE—ELECTRIC POWER FOR STREET RAILWAY AND PUBLIC LIGHTING IN CONNECTION WITH COMMERCIAL SALE. A light and power company operating a street railway system and public lighting plant, is not entitled to exercise the right of eminent domain to secure electric power to sell to the public, generally and without discrimination, in addition to its electric light and street railway system, since such use is not a public use. *State ex rel. Harris v. Superior Court*..... 660

7. SAME—RIGHT TO CONDEMN—POSSIBILITY OF DIVERSION TO PRIVATE USE. The prevention of the diversion to private uses of private property taken for a public use, rests in the supervisory power of the state rather than in the denial of the exercise of the right of eminent domain. *State ex rel. Harlan v. Centralia-Chehalis etc. Power Co*..... 632

8. EMINENT DOMAIN—BY STREET RAILWAY FOR POWER PURPOSES—RIGHT—NECESSITY OF ANTECEDENT FRANCHISE. Upon a proceeding by a street railway company to condemn land for the purpose of creating the necessary power to operate a street railway system, it is not necessary to show, that the company has acquired all its right of way or obtained all franchises from the cities in which it expects to operate, where it appears that it was proceeding diligently to secure right of way and franchises which had been practically agreed upon. *Id.*..... 632

9. EMINENT DOMAIN—FOR RAILROAD—PUBLIC USE AND PUBLIC NECESSITY—EVIDENCE—SUFFICIENCY. Sufficient proof of public use and necessity is shown for the condemnation of a railroad right of way, for a branch three miles long, although there is at present but one factory in the territory to be served, where it appears that the territory is tide lands of considerable extent, peculiarly adapted to manufacturing purposes, and it is conceded that the branch when completed will be a commercial railroad, and that the use is a public one; since the question of public use is determined by the character and not the extent of the use. *State ex rel. Ami Co. v. Superior Court*..... 675

10. EMINENT DOMAIN—NOTICE OF PROCEEDINGS—AFFIDAVIT FOR PUBLICATION. Under Bal. Code, § 5638, the affidavit, authorizing publication of notice to an owner whose residence is unknown, in proceedings for the condemnation of land, to be made by the agent or attorney of the corporation, need only show that the residence of such

EMINENT DOMAIN—CONTINUED.

owner is unknown to, or cannot be ascertained by, the "Deponent," and need not show that the same was unknown to the petitioner or any of its agents, officers or servants. *Moynahan v. Superior Court*..... 172

11. SAME—MOTION TO QUASH—RESIDENCE UNKNOWN—EVIDENCE—SUFFICIENCY. A motion to quash a service by publication, in condemnations proceedings, on the ground that the defendant's residence was known or could have been ascertained, is properly denied where it appears that diligent effort was made to ascertain the same, and that his house on the premises was boarded up, and none of his neighbors knew his actual residence. *Id*..... 172

12. SAME—PROCESS—PERSONAL SERVICE OUTSIDE OF STATE. In proceedings to condemn land for a public street, personal service on a nonresident defendant outside of the state, in lieu of service by publication, is authorized by Laws 1905, p. 86, providing for service as in civil actions, and Bal. Code, § 4879, providing that personal service outside the state shall be equivalent to service by publication. *State ex rel. Thomas v. Superior Court*..... 521

13. SAME—PROOF OF SERVICE. Proof of service of a summons upon the defendants is sufficient where there were two affidavits, one of which showed a service on both defendants, the second affidavit showing that the party making the service was qualified. *Id*... 521

14. SAME—ANSWER IN CONDEMNATION PROCEEDINGS. In condemnation proceedings no answer is required, and it is not error to strike the same. *State ex rel. Ami v. Superior Court*..... 675

15. EMINENT DOMAIN — PLEADINGS — ANSWER — STRIKING—HARMLESS ERROR. Upon a condemnation proceeding by a city to condemn property for widening and extending a street, under Laws 1905, p. 84, it is error to strike out a cross-petition of certain defendants setting up a leasehold interest in a building upon the property; but the same does not amount to reversible error where there were conflicting interests in the property and where the court proceeded in accordance with section 13 of the above mentioned statute to ascertain the total damage, leaving the distribution of the damages among the claimants of the several interests to be afterwards determined. *Seattle v. Park* 151

16. SAME — TRIAL — SEPARATE FINDINGS — ISSUE AS TO TITLE OF DEFENDANTS. Under Laws 1905, p. 84, § 8, providing that the jury shall ascertain the compensation to be paid to all persons claiming any interest in the land, does not relate to cases where there is doubt or contest as to such ownership, in view of § 13, providing that in such case the proceeding shall not be delayed; and the court may require the jury to ascertain the entire compensation, and adverse claimants to interplead, so as to fully determine the rights in the compensation ascertained. *Id*..... 151

EMINENT DOMAIN—CONTINUED.

17. SAME—RECORD ON APPEAL—PRESUMPTIONS Where the record on an appeal does not contain the pleadings of the defendants, in a proceeding to condemn property for widening a street, under Laws 1905, p. 84, and it appears that twelve parties were represented by counsel at the trial, claiming interest in the property, the court may refuse to require the jury to assess the compensation to be paid each person; and in aid of a judgment it will be presumed that there was a doubt or contest as to the ownership of the property condemned authorizing such refusal within the meaning of § 13 of the act. *Id*..... 151

18. EMINENT DOMAIN—CONDEMNATION BY RAILWAY—FAILURE TO COMPLY WITH CORPORATION LAWS—FILING AND LICENSE FEES. Upon certiorari to review a proceeding by a foreign railway company to condemn lands, it cannot be objected that the company failed to show the payment of a license fee and the issuance by the secretary of state of a license to do business in this state, where (1) the objection is raised by private parties; (2) the application avers that the company is so authorized; (3) the articles of incorporation were filed prior to the enactment of the law requiring a license; and (4) where the law requires, and the court will presume, the payment of a fee and issuance of a license prior to the filing of the articles, which were shown to have been filed. *State ex rel. Ami Co. v. Superior Court*..... 675

19. MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—BENEFITS TO LAND NOT TAKEN—DUE PROCESS. After the assessment of damages by a jury for the condemnation of property for the purposes of widening a street, in which proceeding the jury finds that the remainder of the lands was not damaged by the improvement, such remainder is liable to an assessment if found to be specially benefited by the improvement, and such an assessment is not a taking of private property without due process of law. *In re Pike Street*..... 551

20. SAME—ASSESSMENT OF DAMAGES TO PROPERTY NOT TAKEN—ISSUES DETERMINED. In a proceeding to condemn land for the purpose of a street, it is not error to exclude evidence as to the damages to defendant's remaining property, at the time of the consideration of the assessment roll, since that question should have been tried by the jury at the time of assessing the damages for the property taken. *Id*..... 551

21. SAME—ANSWER—STRIKING—HARMLESS ERROR. In a proceeding to condemn land for the purpose of a street, the striking of an answer alleging that the defendant's property would be damaged in a certain sum, is not prejudicial error, where the defendant was permitted at the trial to introduce his evidence of such damage. *Id*..... 551

EMPLOYEES:

See MASTER AND SERVANT.

EQUITY:

See QUIETING TITLE.
Necessity of doing equity, see BROKERS, 1.
Relief against cancellation of lease, see PUBLIC LANDS, 6.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

ESTOPPEL:

As to condition in deed, see DEEDS, 4.
As to tenants, by judgment, see JUDGMENTS, 1-3.
Inconsistent pleading, see PLEADING, 6.
Of railroad company to question authority of agent, see CARRIERS, 5.
To assert waiver of rights under insurance policy, see INSURANCE, 1.
To dispute plat of streets, see PUBLIC LANDS, 3.

EVICTION:

Of tenant of demised premises, see LANDLORD AND TENANT, 3-5.

EVIDENCE:

See WITNESSES.
Abandonment, see DIVORCE, 1.
Appointment of receiver, sufficiency, see RECEIVERS, 1.
As to mental anguish, see DAMAGES, 8.
As to special benefits, see MUNICIPAL CORPORATIONS, 23.
As to surrender of bond, sufficiency, see VENDOR AND PURCHASER, 8.
By parol, varying written contract, see CONTRACTS, 5, 6; MORTGAGES, 7.
Condemnation proceedings, see EMINENT DOMAIN, 4, 9, 11.
Dying declarations, see CRIMINAL LAW, 12-15.
Foreclosure, see MECHANICS' LIENS, 1.
For breach of contract, see CONTRACTS, 4-8.
For collection of taxes, see TAXATION, 2.
For personal injuries through defects in streets, see MUNICIPAL CORPORATIONS, 31, 32.
For personal injuries to passengers, see CARRIERS, 9.
For personal injuries, see MASTER AND SERVANT, 2-4, 6, 10-13.
For recovery of subscription, see SUBSCRIPTION, 1.
For rescission of contract, sufficiency, see BROKERS, 2; VENDOR AND PURCHASER, 7.
Hearsay, harmless error, see CRIMINAL LAW, 10.
In action on insurance policy, see INSURANCE, 3-6.
Instructions as to, see TRIAL 3.
Newly discovered, as ground for new trial in civil actions, see NEW TRIAL, 4.

EVIDENCE—CONTINUED.

Objections for purpose of review, see APPEAL AND ERROR, 3.
Of acceptance of offer, sufficiency, see VENDOR AND PURCHASER, 1.
Of adverse possession, sufficiency, see ADVERSE POSSESSION; BOUNDARIES, 1.
Of assault, see CRIMINAL LAW, 6, 9, 10.
Of cause of fire, sufficiency, see NEGLIGENCE, 1, 2.
Of community character of property, see HUSBAND AND WIFE, 3.
Of damages, see DAMAGES, 1.
Of deceit in sale of lands, sufficiency, see ACCOUNT, 1.
Of experts as to probable future loss, see DAMAGES, 3, 5.
Of fraud, sufficiency, see FRAUD, 1.
Of intention, deed absolute in form, sufficiency, see MORTGAGES, 5.
Of other crimes, see CRIMINAL LAW, 7.
Of negligence, sufficiency, see PHYSICIANS AND SURGEONS, 1.
Of title, see REPLEVIN, 1, 2.
Opinion as to disease, see INSURANCE, 5, 6.
Oral evidence of conveyance, see QUIETING TITLE, 1.
Questions of fact for jury, see TRIAL, 2.
Recital in deeds, see DEEDS, 1, 2.
Review, harmless error in rulings on, see APPEAL AND ERROR, 14-17.

1. EVIDENCE—BEST AND SECONDARY—COPY OF CONTRACT. The copy of a contract is inadmissible where it appears that there were two originals of the same, both in the city where the trial was had, and there was no showing that either of them was lost or unobtainable. *Reynolds v. Reynolds*..... 107

2. EVIDENCE—OBJECTIONS—MOTION TO STRIKE. That part of the evidence of a witness is shown upon cross-examination to be derived from hearsay is not ground for striking the whole of the testimony, and such a motion is properly overruled where some of the matters testified to were within the knowledge of the witness. *Spokane v. Costello*..... 182

3. EVIDENCE—DUE PREPARATION FOR TRIAL—COMPETENCY. A motion for a new trial, filed in a certain action against the city, showing that the corporation counsel was alone familiar with the case, and had been suddenly taken ill, does not tend to show that the city had not made proper preparation for the trial, and is properly excluded when offered in evidence in a subsequent action for the purpose of proving such fact. *Id*..... 182

EXCEPTIONS:

Sufficiency for purpose of review, see APPEAL AND ERROR, 4, 5.
Time for taking, see APPEAL AND ERROR, 6.

EXCESSIVE DAMAGES:

See DAMAGES, 8-12.

EXECUTION:

Action by receiver to set aside, see CORPORATION, 2.

1. EXECUTION—ISSUANCE AFTER PAYMENT OF JUDGMENT—SALE—TITLE OF PURCHASER. A judgment creditor purchasing at a sale under an alias execution issued after the judgment was fully paid acquires no title. *O'Brien v. Allen*..... 393

EXECUTORS AND ADMINISTRATORS:

Review of order vacating leave to sue, see APPEAL AND ERROR, 1.
Testimony as to transactions with decedents, see WITNESSES, 1.

1. EXECUTORS AND ADMINISTRATORS—ESTATE OF NONRESIDENT—NECESSITY OF ADMINISTRATION. It is unnecessary to administer upon the estate of a nonresident testator who never resided in this state, and who left no personal property here, after the lapse of more than ten years after his death, he having left no debts and there being no liens upon the real estate of which he died seized, Bal. Code, § 4642, providing that in such case the estate shall vest immediately in the heirs without the necessity of administration. *Murphy v. Murphy*..... 142

2. SAME—APPOINTMENT AND REMOVAL. The court in probate has the power to revoke the appointment of an administrator c. t. a. upon the application of the heirs upon its being made to appear that there is no legal necessity for administration. *Id*..... 142

3. EXECUTORS AND ADMINISTRATORS—POSSESSION OF REAL ESTATE—STATUTES—IMPLIED REPEAL. Bal. Code, § 4640, providing that the title to real estate of which an intestate dies seized shall vest immediately in the heirs at law, whose right to possession shall be valid as against all persons except only an executor or administrator when appointed, is not inconsistent with and does not impliedly repeal the earlier law, Bal. Code, §§ 6200, 6296 and 6297, giving an administrator the right to the possession of the real estate. *Gibson v. Slater*..... 347

4. SAME—RIGHTS OF ADMINISTRATOR—ACTION AGAINST HEIR. An administrator of the estate of a married woman, appointed within six years after her death, in the interest of heirs at law, may recover possession of the real estate seized by the husband and held adversely to the other heirs, even if the deceased left no debts. *Id*..... 347

5 EXECUTORS AND ADMINISTRATORS—ACTIONS—SET-OFF AND COUNTER-CLAIM—PRESENTATION OF CLAIM. Under Pierce's Code, § 1093, in an action by an executor or administrator, a demand against the deceased, belonging to the defendant at the time of the death of plaintiff's decedent, may be offset without the defendant's having presented any claim therefor against the estate; but he is limited to the extinguishment of the debt if no claim has been presented against the estate. *Fishburne v. Merchants Bank of Port Townsend*.... 473

EXECUTORS AND ADMINISTRATORS—CONTINUED.

6. SAME—NOTE OF DECEASED NOT DUE AT DATE OF DEATH. In an action by an administrator to recover of a bank the amount of deposit belonging to the deceased, the bank may offset a note belonging to it at the time of the death of the deceased, which matured after such death, but before the commencement of the action, under Peirce's Code, §§ 380, 1091, and 1093. *Id*..... 473

EXPERTS:

Opinions as to disease, see INSURANCE, 5, 6.

FACTORY ACT:

See MASTER AND SERVANT, 11.

FEES:

Of corporations, payment, see EMINENT DOMAIN, 18.
Of objectors to local improvements, see MUNICIPAL CORPORATIONS, 11.

FELLOW SERVANTS:

See MASTER AND SERVANT, 7.

FINAL JUDGMENT:

Appealability, see APPEAL AND ERROR, 1.

FINDINGS:

In condemnation, see EMINENT DOMAIN, 16.

FIRE DEPARTMENT:

Liability of city, see MUNICIPAL CORPORATIONS, 33.

FORCIBLE ENTRY AND DETAINER:

See LANDLORD AND TENANT, 1.

1. FORCIBLE ENTRY AND DETAINER—WHO MAY MAINTAIN—OCCUPANTS—TENANT REFUSING TO PROSECUTE. Under Bal. Code, § 5526, subd. 2, giving the right to an "occupant" of land to maintain an action of forcible entry and detainer, a landlord cannot maintain the action against one who wrongfully enters upon lands occupied by a tenant, although the tenant refuses to prosecute and surrenders up his lease to the landlord (FULLERTON, J., dissenting). *Chezum v. Campbell*..... 560

FORECLOSURE:

Of mechanics' liens, see LIMITATION OF ACTIONS, 1; MECHANICS' LIENS.
Of mortgage, see MORTGAGES, 2-4.

FOREIGN CORPORATIONS:

Service of process, statutory agent, see PROCESS, 2.

FORFEITURES:

Of lease of tide lands, see PUBLIC LANDS, 4-6.

FRANCHISES:

Grant by municipality, see MUNICIPAL CORPORATIONS, 5.
Necessity of, see EMINENT DOMAIN, 8.

FRAUD:

See RECEIVERS, 1; RELIGIOUS SOCIETIES, 1; SALES, 1, 2.
As defense in action for subscription, see SUBSCRIPTION, 1.
Conspiracy to defraud, see CRIMINAL LAW, 4.
Deceit in sale of lands, see ACCOUNT, 1.
In assessment, see TAXATION, 3.
In election to amend charter, see MUNICIPAL CORPORATIONS, 4.
In issuance of bill of lading, as defense, see CARRIERS, 7.
In sale of stock, rights of corporation, see CORPORATIONS, 1.
Misrepresentations of vendee, see SALES, 1, 2.
Of brokers, rescission of contract, see BROKERS, 2.
Sales of realty, see VENDOR AND PURCHASER, 7.

1. FRAUD—OBTAINING MONEY THROUGH FALSE PRACTICES OF WIFE—EVIDENCE—SUFFICIENCY. There is sufficient evidence that the defendant was a party to the fraud whereby his wife obtained possession of plaintiff's money, where it appears, that plaintiff and defendant were fellow workmen at a smelter; that the defendant was the only person who knew that the plaintiff was to leave on a certain train, with $600 to invest in real estate; that defendant's wife preceded plaintiff to said train, and was introduced to him under a false name, and induced him to loan the money by giving him a mortgage on real estate which she did not own, shortly after transferring other property to her husband without consideration and leaving the state; and where the defendant received part of the money, soon left the state, and his evidence is equivocal and contradictory. *Mosley v. Donnell*..... 518

FRAUDS, STATUTE OF:

1. FRAUDS, STATUTE OF—PART PERFORMANCE. An oral contract to sell in a certain territory exclusively the goods of a certain manufacturer is taken out of the operation of the statute of frauds by part performance in expending money and working up a market for the sale of the goods. *Federal Iron and Brass Bed Co. v. Hock*..... 668

2. FRAUDS, STATUTE OF—SALE OF LANDS BY CORPORATION—MEMORANDUM OF SALE—RESOLUTION OF DIRECTORS—SUFFICIENCY. A resolution of the board of directors of a corporation authorizing the sale of lands of the corporation, stating the terms of sale, a copy of which signed by the president as the representative of the corporation, was delivered to the purchaser, constitutes a sufficient memorandum of sale to take the sale out of the operation of the statute of frauds, and the same can be specifically performed. *Western Timber Co. v. Kalama River Lumber Co*..... 620

FRAUDS, STATUTE OF—CONTINUED.

3. SAME — MUTUALITY OF CONTRACT — ACCEPTANCE OF PURCHASER — BRINGING ACTION FOR SPECIFIC PERFORMANCE. A resolution by the board of directors of a corporation authorizing the sale of its lands, is not insufficient as a memorandum of sale, or void for want of mutuality, because not signed by the purchaser, where the purchaser's assent thereto is shown by promptly bringing an action for the specific performance of the contract of sale. *Id*..... 620

GUARANTY:

See INDEMNITY; PRINCIPAL AND SURETY.

GUARDIAN AND WARD:

Guardian ad litem, see INFANTS, 1.

1. GUARDIAN AND WARD—ACTIONS—BY FOREIGN GUARDIAN—COURTS—JURISDICTION—LEAVE TO SUE. The superior court has jurisdiction, on the principles of comity, to grant leave to a foreign guardian of nonresident wards to maintain an action in this state against the executors of an estate, there being no statute prohibiting the same. *In re Crosby*..... 366

2. SAME—PROPERTY—STATUTES—CONSTRUCTION. Bal. Code, § 6419, providing for the removal to another state of the "property" of nonresident wards, where the guardian is also a nonresident, applies to choses in action, in view of the provision authorizing the guardian to sue therefor. *Id*..... 366

HARMLESS ERROR:

See APPEAL AND ERROR, 17-20.
In admission of evidence, see INDEMNITY, 1.
In criminal prosecution, see CRIMINAL LAW, 10.

HEALTH:

License of plumbers as health regulation, see CONSTITUTIONAL LAW, 4.
Permanent impairment, see DAMAGES, 7.

HEARSAY EVIDENCE:

Copy of contract as evidence, see EVIDENCE, 2.

HUSBAND AND WIFE:

See DIVORCE.
Equity of deceased wife, notice, see VENDOR AND PURCHASER, 4-6.

1. HUSBAND AND WIFE—ALIENATION OF AFFECTIONS—DEFENSES—PRIOR SEPARATION. A separation of a husband and wife, prior to any acts by the defendant cannot be set up as a bar to an action for alienation of the affections of the wife, on the theory that no affection existed; the right to a reconciliation being one that a stranger cannot interfere with. *Morris v. Warwick*..... 480

HUSBAND AND WIFE—CONTINUED.

2. HUSBAND AND WIFE—SEPARATE JUDGMENT AGAINST WIFE—LIEN ON COMMUNITY PROPERTY—MORTGAGES—PRIORITY. A judgment against the wife reciting that it is her separate debt is not a lien upon the community real estate of the husband and wife, at least not until the levy of execution; and the husband cannot acquiesce in levy and sale of community property thereunder, as against mortgagees of the property prior in time to the issuance of such execution. *Graham v. Smart*..... 205

3. HUSBAND AND WIFE—COMMUNITY PROPERTY—EVIDENCE OF CHARACTER—SUFFICIENCY. Real property is shown to be the community property of husband and wife where the only witness examined was the husband, who testified that he had purchased the property after marriage, with community funds of himself and wife; and the admissions contained in the records in probate proceedings to which the husband and wife were not parties are not competent evidence against them. *Id*..... 205

IDENTITY:

Evidence of, see CRIMINAL LAW, 13.

IMPEACHMENT:

Of witness see WITNESSES 4.

IMPROVEMENTS:

Liens, see MECHANICS' LIENS.
Public improvements, see MUNICIPAL CORPORATIONS, 9-27.

INDEMNITY:

See PRINCIPAL AND SURETY, 1.

1. INDEMNITY—AGAINST JUDGMENT—EVIDENCE—OF PARTY AT TRIAL OF ORIGINAL ACTION—COMPETENCY—HARMLESS ERROR. In an action by a city upon the indemnity bond of a contractor to recover the amount of a judgment recovered against the city, the testimony of the plaintiff in the original action, who died since the trial thereof, is not competent as intrinsic evidence of any fact necessary to be shown outside of the record of the original action, to bind the person liable over to the city as the original judgment debtor; but the admission of such evidence for that purpose is not prejudicial where there is other uncontradicted competent evidence of the ultimate fact sought to be proved, which was admitted without objection. *Spokane v. Costello*..... 182

INDIANS:

Adverse possession by, see ADVERSE POSSESSION, 1.

INDICTMENT AND INFORMATION:

See CRIMINAL LAW, 1-5.

INFANTS:

See ADOPTION; GUARDIAN AND WARD.
Child labor, see MASTER AND SERVANT, 1.
Right of redemption, see MORTGAGES, 3.

1. MORTGAGES — FORECLOSURE — INFANTS — FAILURE OF GUARDIAN AD LITEM TO ANSWER. A decree of foreclosure of a mortgage is not void as to a minor heir because of the failure of her guardian *ad litem* to file an answer, where he appeared by filing his acceptance of the appointment, proofs were taken, and sufficient facts appear to warrant the decree, in the absence of an affirmative defense. *Gravelle v. Canadian and American Mortgage etc. Co*..... 457

INHERITANCE:

Tax on, title of act, see STATUTES, 3.

INJUNCTION:

Action on bond, sufficiency of evidence, attorney's fees as damages, see BONDS, 1, 2.
Against change of grade, see MUNICIPAL CORPORATIONS, 6-8.
Modification, costs, see APPEAL AND ERROR, 25.
Relief against cancellation of lease, see PUBLIC LANDS, 6.

INSOLVENCY:

Of corporation, see CORPORATIONS, 2.

INSTRUCTIONS:

In civil actions, see TRIAL.
In criminal prosecutions, see CRIMINAL LAW, 20-26.
To employee as to dangers, see MASTER AND SERVANT, 1.

INSURANCE:

1. LIFE INSURANCE — POLICY — WAIVER — ACCEPTANCE OF OVERDUE PREMIUMS. A life insurance company waives the provisions of the policy requiring monthly payments of a premium to be made in advance, by continually accepting payments any time within the month, without question or objection, and this course of conduct was such as to mislead a person of ordinary prudence. *Morgan v. Northwestern National Life Ins. Co*..... 10
2. INSURANCE — BENEFIT CERTIFICATES — CONDITIONS PRECEDENT — PLEADING—GENERAL DENIAL. In an action upon a benefit certificate, in which the plaintiff alleges generally the performance of all conditions precedent, the defendant, in order to rely upon a breach of any such condition, must specifically plead the condition and breach, a general denial being insufficient for that purpose. *Taylor v. Modern Woodmen of America*..... 304
3. SAME—CAUSE OF DISEASE—MATERIALITY. In an action upon a benefit certificate, evidence as to what cause the deceased had attributed a disease is immaterial. *Id*..... 304

INSURANCE—CONTINUED.

4. EVIDENCE—WRITTEN ANSWERS OF DECEASED—BEST AND SECONDARY. In an action upon a benefit certificate, the written answers of the deceased, as contained in the physician's report, is the best evidence of his disclosures to the physician, and it is not error to exclude the physician's evidence as to such disclosures. *Id*..... 304

5. SAME—OPINION EVIDENCE—NON-EXPERTS. In an action upon a benefit certificate, it is proper to exclude the opinion of non-expert witnesses as to conduct of the deceased indicating that he had a certain disease. *Id*..... 304

6. EVIDENCE—MEDICAL EXPERTS—COMPETENCY. A medical expert is shown to be competent to give an opinion as to whether a cancer was of recent growth, where it appears that he graduated in medicine twenty years ago, had practiced ever since, taken post graduate courses, assisted in performing the operation upon the deceased, and saw and examined the cancer. *Id*..... 304

INTENT:

Admissibility of evidence of intent to kill, see CRIMINAL LAW, 9, 10
Criminal, see CRIMINAL LAW, 11.
To commit larceny, see CRIMINAL LAW, 25.

INTEREST:

See USURY.
Rate on foreign contract, usury, see CONTRACTS, 2.

1. INTEREST—WHEN RECOVERABLE WITHOUT PLEADING. In an action to recover the amount of a judgment paid by an indemnified party, interest is recoverable from the date of the payment up to the time of the trial, although the complaint did not contain any demand for the interest, and the same may be properly included in the verdict. *Spokane v. Costello*..... 182

2. INTEREST—NOTE OF ANOTHER STATE—FOREIGN LAWS—CONSTRUCTION. Where a promissory note called for interest at two per cent per month, without specifying any rate after maturity, and the laws of the state where made expressly provide that in such case interest after maturity shall be at the rate of eight per cent per annum, there is no presumption that the parties intended it to run at two per cent per month, and only eight per cent per annum after maturity can be collected. *Bank v. Doherty*..... 317

INTERPLEADER:

1. CONTRACTS — PLEADINGS — INTERPLEADER — SUFFICIENCY OF COMPLAINT. In an action to recover a sum of money deposited in bank to be paid to the plaintiff upon the performance by him of a contract, a complaint setting up the contract, the performance thereof, and which states a cause of action against the bank is sufficient without

INTERPLEADER—CONTINUED.

amendment to state a cause of action against the other parties to the contract, who were required to interplead, upon the bank's disclaiming title and paying the money into court for the use of the parties entitled thereto. *Pierson v. Peirce*..... 164

INTERVENTION:

Of counsel to obtain fees, see DIVORCE, 2.

IRRIGATION:

See NAVIGABLE WATERS.

JOINDER:

Of parties in civil actions, see PARTIES, 1, 2.

JOINT OBLIGORS:

As parties plaintiff, see NEW TRIAL, 1.

JUDGES:

See COURTS.

JUDGMENT:

See HUSBAND AND WIFE, 2.
As evidence, conclusiveness, see INDEMNITY, 1.
Decree in specific performance, see VENDOR AND PURCHASER, 12.
In ejectment, offset, see JUDGMENT, 1.
On appeal, see APPEAL AND ERROR, 21-25.
On the pleadings, see PLEADING, 8.
On redemption by mortgagee in possession, see MORTGAGES, 3.
Personal judgment for deficiency on foreclosure, see MECHANICS' LIENS, 3.
Priority as lien on community property, see HUSBAND AND WIFE, 2.
Recovery of interest to date of trial, see INTEREST, 1.
Review, see APPEAL AND ERROR.

1. JUDGMENT — RES JUDICATA — ISSUES DETERMINED — RIGHT TO USE WATERS OF STREAM. A judgment establishing the plaintiff's right to use the waters of a stream by priority of appropriation is *res judicata* and a bar to an action by the defendant to recover the water by right of prescriptive use for more than ten years, where the complaint in the former action alleged generally title in fee simple, demanding that defendant set up his title, if any, and the answer of the defendant raised only the issue of prior appropriation; especially where the prescriptive use claimed in the second action was coincident with the appropriation claimed in the former action. *Spring Hill Irr. Co. v. Lake Irr. Co*..... 379

2. JUDGMENT—RES JUDICATA—ACTION TO SET ASIDE A DEED—ISSUES DETERMINED. In an action to set aside a deed, made in fraud of creditors, and to subject the land to the lien of a certain judgment,

JUDGMENT—CONTINUED.

a decree adjudging the deed void and subjecting the land described to the lien of such judgment merely describing the same for identification as being between certain parties for the sum of $1,327, and costs, is not *res judicata* of the amount due upon such judgment, when it appears that the question as to the amount due was not within the issues in such action, although one of the findings of fact, as signed, was to the effect that $200 had been paid on the judgment since its rendition, and by another finding it was found that $1,327 and costs were due; it further appearing that interlineations and erasures had been made in the findings, and the judgment creditor not disputing in his testimony that in fact $200 had been paid, and not credited. *O'Brien v. Allen*..... 393

3. JUDGMENTS — RES ADJUDICATA — MATTERS NOT CONCLUDED. An adjudication that tenants of a former owner are entitled to a notice or demand before suit in ejectment by the holders of a tax title, is not an adjudication that the relation of landlord and tenant existed between the parties. *Carlson v. Curran*..... 647

JURISDICTION:

See QUO WARRANTO, 1.
Appellate jurisdiction, see APPEAL AND ERROR, 1-3.
Effect of appearance, see APPEARANCE, 1.
Of courts, see RELIGIOUS SOCIETIES, 1.
Of courts in action by foreign guardian, see GUARDIAN AND WARD, 1.
Process to support, see PROCESS, 2.
Review of assessment of tax, see TAXATION, 2.

JURY:

Assessment of damages in condemnation proceedings, see EMINENT DOMAIN.
Disqualification or misconduct ground for new trial, see NEW TRIAL, 2.
Instructions in civil actions, see TRIAL.
Instructions in criminal prosecutions, see CRIMINAL LAW, 20-26.
Right to demand list, see CRIMINAL LAW, 17.

LACHES:

Delay in redemption from mortgagee, see MORTGAGES, 6.

LAKES:

Rights of littoral owners, see WATERS.

LANDLORD AND TENANT:

Action by occupant, see FORCIBLE ENTRY AND DETAINER, 1.
Excessive verdict for wrongful eviction, see DAMAGES, 8.

1. LANDLORD AND TENANT—EXISTENCE OF RELATION—EFFECT OF JUDGMENTS IN EJECTMENT—ESTOPPEL. The existence of the relation of

LANDLORD AND TENANT—CONTINUED.

landlord and tenant is not established where the complaint in ejectment suits, brought by the holders of a tax deed, against tenants of the former owner, did not recognize the relation of landlord and tenant and the answer denied such relation, although such suits were erroneously dismissed for want of sufficient notice to pay rent or surrender the premises; and the tenants are not estopped, in a subsequent action of unlawful detainer, to deny that they were tenants of the holders of the tax deed; nor does an unaccepted offer to pay rent establish the relation. *Carlson v. Curran*..... 647

2. LANDLORD AND TENANT—LEASE—ASSIGNMENT—LEGAL EFFECT OF INSTRUMENT. A written instrument under which a tenant of a building turned over to another the demised premises, constitutes an assignment of the lease and not a sub-lease, and does not create the relation of landlord and tenant between the parties, where, although it was in form a lease, it covered the entire term acquired by the grantor under the original lease, without any reversion to the grantor, and contained the exact terms and covenants thereof. *Weander v. Claussen Brewing Association*..... 226

3. SAME—EVICTION—LIABILITY OF ASSIGNOR. Where an instrument is an assignment of a full leasehold term, the assignor is not liable to the assignee for a wrongful eviction by the original lessor, notwithstanding the right of re-entry for nonpayment of rent was reserved to the assignor. *Id*..... 226

4. LANDLORD AND TENANT—WRONGFUL EVICTION—JOINDER OF CAUSES OF ACTION. In an action for wrongful eviction, it is proper to join causes of actions for property destroyed and for other property converted to the use of the defendant, where the same arise out of the same wrongful act. *McClure v. Campbell*..... 252

5. SAME—DAMAGES—MENTAL SUFFERING. In an action for wrongful eviction, damages for mental suffering may be recovered as the natural and probable consequences of the wrong, where it appears that one of the plaintiffs was in a delicate condition, that the doors and the walls of their rooms were torn down, their goods removed into the street, and they had no place to go and were humiliated and suffered mental anguish (FULLERTON, J., dissenting). *Id*... 252

LANDS:

See PUBLIC LANDS.

LARCENY:

See CRIMINAL LAW, 5.
Evidence, variance, see CRIMINAL LAW, 25.

LEASES:

See LANDLORD AND TENANT.
Of public lands, reinstatement, see MANDAMUS, 1.
Of tide lands, see PUBLIC LANDS, 4-6.
Surrender of, action by landlord, see FORCIBLE ENTRY AND DETAINER, 1.

LEGISLATIVE POWER:

Delegation of, see CONSTITUTIONAL LAW, 5.
Establishment of streets, see MUNICIPAL CORPORATIONS, 28.

LICENSES:

Of plumbers, see CONSTITUTIONAL LAW, 4.
Restrictions on trade by license fee on nonresidents, see CONSTITUTIONAL LAW, 3.

LIENS:

See MECHANICS' LIENS.
Mortgage, see CHATTEL MORTGAGES; MORTGAGES, 2, 3
On railroads, see RAILROADS, 1.
Tax lien, see TAXATION, 1, 3.

LIFE INSURANCE:

See INSURANCE.

LIMITATION OF ACTIONS:

See ADVERSE POSSESSION.
Boundary, see BOUNDARIES, 1.
To compel assessment see MUNICIPAL CORPORATIONS, 14.

1. LIMITATION OF ACTIONS — COMMENCEMENT — FORECLOSURE OF MECHANICS' LIEN. Bal. Code, § 4807, providing that an action shall be deemed commenced when the complaint is filed, applies to the commencement of an action to foreclose a mechanics' lien, which is accordingly barred if the complaint is not filed within eight months after the filing of the lien. *Service v. McMahon*..... 452

LOANS:

See USURY, 1, 2.

LOGS AND LOGGING:

Safe method of doing business, see MASTER AND SERVANT, 6.

LOSS:

Of time, damages for, see DAMAGES, 5.

MACHINERY:

Duty to guard, see MASTER AND SERVANT, 11.

MALPRACTICE:

See PHYSICIANS AND SURGEONS.
Damages for, see DAMAGES, 10.

MANDAMUS:

To compel reassessment, see MUNICIPAL CORPORATIONS, 12, 14.
To compel election on charter amendments, see APPEAL AND ERROR, 16; MUNICIPAL CORPORATIONS, 4.
To test constitutionality of law, see CONSTITUTIONAL LAW, 1.

1. MANDAMUS—TO STATE OFFICERS—LEASE OF TIDE LANDS—REINSTATEMENT. Mandamus will lie to compel the commissioner of public lands to reinstate a lease and accept rent; since, under Bal. Code, §§ 2149-2155, the right of appeal is given only from decisions of the state board of land commissioners and not from orders of the commissioner. *State ex rel. Smith v. Ross*..... 439

MANDATE:

See MANDAMUS.

MARRIED WOMEN:

See HUSBAND AND WIFE.

MASTER AND SERVANT:

Liens for labor, see MECHANICS' LIENS.

1. MASTER AND SERVANT—WHEN RELATION EXISTS—LOAN OF SERVANT. Where an employer loans his servant to another for a particular service, the servant for anything done in that employment must be regarded as the servant of the one to whom he was loaned. *Wiest v. Coal Creek R. Co*..... 176

2. MASTER AND SERVANT—YOUTHFUL EMPLOYEE—DUTY TO WARN AS TO DANGERS OF OPERATION OF RE-SAW. The court cannot say, as a matter of law, that as to a youth of the age of sixteen years, without any experience under the existing conditions, a master owes no duty to instruct him as to the apparent dangers in connection with the operation of a re-saw. *Kirby v. Wheeler-Osgood Co*..... 610

3. MASTER AND SERVANT—NEGLIGENCE—FALL OF FREIGHT DOWN A HATCH—WARNING—DRUNKEN EMPLOYEES. A ship company is liable to an employee who, while in the performance of his duty, is injured by the fall of freight, which was negligently and recklessly lowered down the hatch, without any warning, by drunken employees, who were placed and continued in charge of the operation of unloading freight on a ship. *Melse v. Alaska Commercial Co*. 356

4. MASTER AND SERVANT — NEGLIGENCE — DEFECTIVE BRAKES — EVIDENCE—RELEVANCY. In a complaint for personal injuries which alleges that cars were equipped with poor, defective brakes, only one of which could be set upon a loaded car, it is relevant to ask a witness if there is anything about the brakes that would render them unsafe; also, if any of the brakes were broken at the time. *Wiest v. Coal Creek R. Co*..... 176

MASTER AND SERVANT—CONTINUED.

5. MASTER AND SERVANT—NEGLIGENCE—DUTY OF MASTER—INSTRUCTIONS. In an action against an employer for personal injuries, instructions as to the duty or liability for failure to use due care, if it failed to do so, and if that caused the injury or directly contributed to it, are not objectionable or prejudicial to the defendant from the addition of the words "if you find that other causes contributed to it"; since it imposes no additional burden of proof upon the defendant. *Id.*..... 176

6. MASTER AND SERVANT — NEGLIGENCE — FAILURE TO PROVIDE SAFE METHOD OF DOING BUSINESS — STARTING LOGGING ENGINE WITHOUT WARNING—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained through the negligent starting of a logging engine without giving warning, there is sufficient evidence of negligence to sustain a verdict for the plaintiff, where it appears that the engine used in dragging logs with a cable was not in view of the men attaching the logs, and was about sixty rods distant, and that the defendant failed to supply any appliance by which the engineer could signal to the men that he was about to start the engine excepting by a whistle of the engine, which, on account of the noise of another engine nearby and of the distance, the men could not always hear, that it was customary in the defendant's adopted method of doing business not to start the engine until the men had signaled the engineer, and the plaintiff, while attaching logs in the regular line of his duty, was injured by the starting of the engine without warning, and without having given any signal to the engineer to start the engine (FULLERTON, J., dissenting). *Conine v. Olympia Logging Co*..... 50

7. SAME—CONCURRING NEGLIGENCE OF FELLOW SERVANT. In such a case the concurring negligence of the engineer in starting the engine before receiving a signal so to do will not relieve the master from liability. *Id.*..... 50

8. MASTER AND SERVANT—NEGLIGENCE—FELLOW SERVANTS—MOTORMEN ON STREET RAILWAY. Motormen in the employ of a street railway company are fellow servants where it appears that the company had two freight motors for service on the line, which they were in charge of, that there was no fixed schedule for the running thereof, but the motormen arranged their own time schedules and places for meeting and passing, and were for over a year continually in a position offering opportunities for conferring and exercising influence and caution over one another (HADLEY and DUNBAR, JJ., dissenting). *Grim v. Olympia Light & Power Co*..... 119

9. SAME—ASSUMPTION OF RISK. In such a case one motorman runs the risk of injury from a collision with the other car happening through the failure of the motorman to stop the same upon a foggy morning where fogs were of frequent occurrence (HADLEY and DUNBAR, JJ., dissenting). *Id.*..... 119

MASTER AND SERVANT—CONTINUED.

10. MASTER AND SERVANT—NEGLIGENCE—ASSUMPTION OF RISKS—INJURY TO MINER—PROJECTING TRIP IN SHAFT CATCHING CLOTHING—QUESTION FOR JURY. In an action for personal injuries sustained by an employee in a mine, reasonable minds might differ, and the question of the assumption of risks is for the jury, where it appears that the plaintiff, an experienced miner, who was in charge of the cage which delivered the miners to the different levels of the mine, was injured through the fact that the clothing of one of the men on the cage was caught while descending the shaft by a projecting "trip" used for the purpose of dumping the ore loads into the ore pocket, that although the plaintiff knew that the "trip" projected into the shaft, and could hear it click every time the cage passed it, and that at times it had caught the clothing of the men riding on the cage, the shaft was dark, and the plaintiff had never seen the trip, had nothing to do with placing the men properly in the cage, and the same was daily used with safety. *Pearson v. Federal Min. etc. Co*..... 90

11. MASTER AND SERVANT—ASSUMPTION OF RISKS—PROVIDING GUARDS UNDER FACTORY ACT. The factory act of 1903, requiring employers to provide proper guards for cogs, saws and dangerous machinery, does not deprive the master of the defense of assumed risk, where he has made a *bona fide* effort and used due care to provide a guard for an edger, which an experienced employee had used for three years without objection, and where the employee was injured by a most unusual accident that could not have been reasonably anticipated; and in such case the employee assumes the risk of the injury from such fact, and cannot claim that the guard was not a proper guard. *Johnston v. Northern Lumber Co*..... 230

12. MASTER AND SERVANT—NEGLIGENCE—PREMATURE BLAST—PROPER TORCH—EVIDENCE OF NEGLIGENCE—SUFFICIENCY. In an action to recover for personal injuries sustained by an employee in setting off a blast, the evidence is insufficient to show negligence of the master in furnishing an unsafe torch for igniting the fuse, in that it could not be told when the fuse was ignited, where the plaintiff testified that he had used such torch for several weeks with absolute safety, and had always known when the fuse was ignited, and an expert witness for the plaintiff admitted on cross-examination that such fact could be known by paying attention. *Breckenridge v. American Eagle etc. Min. Co*..... 279

13. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for injuries sustained by an employee through a premature blast, the plaintiff is shown to have been guilty of contributory negligence, where it appears that he set off the blast without having filled the hole, as should have been done, leaving it open with the powder exposed to the sparks from the fuse, and that he tamped the

MASTER AND SERVANT—CONTINUED.

powder with an iron spoon, contrary to instructions, and where it appears that the blast exploded almost immediately after lighting the fuse, and that the fuse spits fire or sparks which might have fallen on the powder. *Id*..... 279

MECHANICS' LIENS:

Limitations as to, see LIMITATAION OF ACTIONS, 1.

1. MECHANICS' LIENS—SUBSTANTIAL PERFORMANCE—CONTRACTS—CONSTRUCTION BY OWNER—FAILURE TO CONDEMN WORK—LIEN FOR BALANCE. The failure of a contractor to place upon the walls of a building a third coat of plaster, which was not a substantial part of the contract, will not bar an action by him to foreclose a mechanics' lien for the balance due on the contract, less the cost of such third coat of plaster, where it appears that the terms of the contract were not clear as to whether two or three coats were called for, that the contract provided that the owner should construe the terms of the contract and his construction should be final, and that he could give a written notice condemning any part of the work as it progressed requiring compliance with the contract, and it further appears that he was present daily during the progress of the work, notified the contractor when the second coat of plaster was dry enough for the woodwork, and gave no notice that any of the work was improper and made no claim respecting a third coat of plaster until the contract was finished. *Sweatt v. Hunt*..... 96
2. MECHANICS' LIENS—FORECLOSURE—ATTORNEY'S FEES—ALLOWANCE IN SUPREME COURT. In an action to foreclose a mechanics' lien, in which the trial court fixed the amount of the attorney's fees, independent attorney's fees will not be allowed in the supreme court upon affirming the judgment. *Id*..... 96
3. MECHANICS' LIEN—FORECLOSURE—DISMISSAL—RIGHT TO PERSONAL JUDGMENT—WAIVER. In an action to foreclose a mechanics' lien which is not commenced within the eight months limited by law for the commencement of such actions, the plaintiff cannot complain of a general judgment of dismissal of the action, when no request was made to preserve the plaintiff's right to a personal judgment, but an unconditional judgment of dismissal was invited, preserving only his right of appeal. *Service v. McMahon*..... 452

MEMORANDA:

Required by statute of frauds, see FRAUDS, STATUTE OF, 2, 3.

MENTAL SUFFERING:

Upon wrongful eviction, see DAMAGES, 8; JUDGMENTS, 5.

MINES AND MINERALS:

Breach of contract of sale, see CONTRACTS, 7.
Employees in mines, see MASTER AND SERVANT.
Personal injury to miner, see MASTER AND SERVANT, 10

MINORS:

See INFANTS; MASTER AND SERVANT, 1.
Notice of claim, see VENDOR AND PURCHASER, 6.

MISTAKE:

As to contract for sale of hops, see SALES, 1.

MORTGAGES:

Equitable redemption, commencement of action, see ACTIONS, 1.
Foreclosure against infants, see INFANTS, 1.
Mortgagee as *bona fide* purchaser, see VENDOR AND PURCHASER, 4.
Personal property, see CHATTEL MORTGAGES.
Premature commencement of foreclosure, see ACTIONS, 1.
Priority as lien on community property, see HUSBAND AND WIFE, 2.
Rate of interest, computation, see INTEREST, 2.
Security for foreign contract, usury, see CONTRACTS, 1.

1. MORTGAGES—PRIORITY—OWNERSHIP OF PRIOR MORTGAGE—NOTICE. A second mortgagee, who advances the money to pay off a prior mortgage in the hands of one not the owner thereof, pending an appeal by the true owner, in litigation respecting his title to such first mortgage, with actual notice of the rights of the true owner and knowledge of the whole transaction, is not entitled to priority over the true owner upon termination of such litigation. *Bank v. Doherty* 317

2. MORTGAGES—FORECLOSURE—DETERMINATION OF PRIORITY OF LIENS. In an action to foreclose a mortgage the court has a right to determine the question of priority of liens upon the mortgaged property, depending upon the character of the property, whether separate or community, and it cannot be objected thereto that such decision would be litigating paramount title. *Graham v. Smart*..... 205

3. MORTGAGES—VOID FORECLOSURE—MORTGAGEE IN POSSESSION—REDEMPTION—DECREE—INFANTS. In an action to recover possession of premises from the successor in interest of a mortgagee in possession under a void foreclosure sale, in which the defendants set up the mortgage and asked its foreclosure, it is proper to decree the payment of the sum due less rents and profits, with a right in the plaintiff to redeem within ninety days; and the fact that the plaintiff is a minor is not in itself a sufficient reason for allowing a further time for redemption. *Gravelle v. Canadian and American Mortgage etc. Co*..... 457

4. SAME—ATTORNEY'S FEES ON FORECLOSURE UNDER CROSS-COMPLAINT. In such an action, it is proper to allow the defendants a reasonable sum as attorney's fees, where the mortgage provided therefor, and the plaintiff did not recognize the mortgage but sought possession and partition, claiming as owner of an interest in the property. *Id*..... 457

MORTGAGES—CONTINUED.

5. MORTGAGES—DEED ABSOLUTE IN FORM—EVIDENCE OF INTENTION—SUFFICIENCY. There is not clear and satisfactory proof that a deed, absolute in form, was intended as security for a debt owing from a son to his father, where it appears, that in May, 1891, the premises were purchased for a consideration of $3,500, the conveyance made to the father, and in June of the same year the father agreed to sell the same to his son, giving a bond for a deed upon consideration that the son should pay to him a note for $2,000 dated on April 29, 1891 that the father died in 1900, leaving a will reciting that in 1889 he had made advances to the son in the sum of $8,000, and subsequently other sums for investment in real estate, and providing for the cancellation of all evidences of indebtedness against the son if he would accept such advances as the son's proportionate share of the estate without contesting the will; that the son testified that the property in question was purchased and paid for by him, and that his father loaned him $2,000 with which to make the final payment, and that the deed was made direct to the father as a mortgage to secure said $2,000; that the father held notes for large sums against the son which were in excess of his proportionate share of the estate, paid taxes on the land since 1891, and at one time wrote his son asking for a quitclaim deed as the bond for a deed had long since been due and "so to speak dead." *Reynolds v. Reynolds*.. 197

6. MORTGAGES—REDEMPTION—EXTENSION OF PERIOD—INDEFINITE TIME—DELAY. Upon an agreement to extend the time for redeeming from a mortgage foreclosure, without any definite time being fixed, offer to redeem must be made in a reasonable time, and five and one-half years is not a reasonable time where valuable improvements have been made and the property has increased in value (ROOT and DUNBAR, JJ., dissenting). *Mann v. Provident Life and Trust Co*... 581

7. MORTGAGES — REDEMPTION — AGREEMENT FOR EXTENSION — PAROL PROOF. Where the written agreement entered into pending the foreclosure of a mortgage makes no mention of any extension of the right of redemption, clear and satisfactory evidence must be produced of any parol agreement to that effect. *Id*..... 581

8. MORTGAGES—CONTRACT FOR REDEMPTION—ADDITIONAL SECURITY—CONSIDERATION — CONSTRUCTION — EXTENSION OF PERIOD. Where a mortgagor, to secure further time, had placed certain valentine scrip with the mortgagee as further security, an agreement pending foreclosure of the mortgage to sell the scrip to the mortgagee at a nominal consideration in return for an agreement to allow a redemption of both the real and personal property, is based upon a valid consideration, inasmuch as there is no right to redeem the scrip upon an execution sale; and the two instruments, one to sell the scrip and the other to resell the same in case the real estate shall be previously redeemed, should be construed to effectuate such

MORTGAGES—CONTINUED.

a contract, and not as an indefinite extension of the time to redeem both the real and personal property (ROOT and DUNBAR, JJ., dissenting). *Id*..... 581

MOTIONS:

Dismissal of appeal, see APPEAL AND ERROR, 15, 16.
For judgment on the pleadings, see PLEADING, 8.

MUNICIPAL CORPORATIONS:

Appropriation of land by, see EMINENT DOMAIN, 1, 2, 19-21.
Compelling city to incur expense of election, see CONSTITUTIONAL LAW, 2.
Mandate to submit charter amendment, compliance, see APPEAL AND ERROR, 16.
Payment to contractor, pending suit for damages against city, see ACCORD AND SATISFACTION, 1.
Release of contractor's surety, see PRINCIPAL AND SURETY, 1.

1. MUNICIPAL CORPORATIONS—CHARTER AMENDMENTS—QUALIFICATION OF PETITIONERS FOR SUBMISSION. Registration is not a necessary element in the qualification of a voter to entitle him to sign a petition for the submission of charter amendments to a vote of the people, under Laws 1903, p. 393. *Hindman v. Boyd*..... 17

2. SAME — QUALIFICATIONS OF PETITIONERS — EVIDENCE — VERIFICATIONS—COMPETENCY. Affidavits verifying the genuiness of the signatures of petitioners for the submission of charter amendments to a vote of the people under Laws 1903, p. 393, are not competent evidence of the qualifications of the signers. *Id*..... 17

3. SAME—DETERMINATION OF CITY COUNCIL. Under Laws 1903, p. 393, it is the duty of the city council to determine in the first instance the qualifications of the signers of a petition for the submission of charter amendments to a vote of the people. *Id*..... 17

4. SAME—ANSWER OF CITY—SUFFICIENCY—DEMURRER. In mandamus proceedings to compel a city council to submit charter amendments to a vote of the people, the answer of the city states a valid defense when it puts in issue the qualifications of the signers of the petition and alleges that their signatures were procured by fraud and that the verifications were not properly taken; and it is error to sustain a demurrer thereto. *Id*..... 17

5 SAME—DELEGATION OF LEGISLATIVE POWER TO PEOPLE—GRANT OF MUNICIPAL FRANCHISES. Bal. Code, § 740, providing that the legislative powers of cities shall be vested in the mayor and city council, does not prevent the adoption of charter amendments requiring the submission of the matter of granting franchises to a vote of the people, and such a charter amendment is not unconstitutional as an unlawful delegation of legislative power to the people. *Id*..... 17

MUNICIPAL CORPORATIONS—CONTINUED.

6. MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE. Where asphalt has been removed for the lowering of an improved street, which is necessary in order to properly connect the ashpalt of a new improvement with that of the older one, the court is justified in finding that there is a change of grade in the older improvement. *Hart v. Seattle*..... 113

7. SAME—DAMAGES. Where a proposed change of grade will result in serious damage to abutting property the improvement may be enjoined until the damage has been ascertained and paid. *Id*... 113

8. SAME—INJUNCTIONS—TERMS OF. A temporary injunction to enjoin a change of grade until compensation for the damage to abutting property is first ascertained and paid is too sweeping where it enjoins the completion of the work upon the grade already established. *Id*..... 113

9. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—NOTICE. Notice of the hearing of objections to a proposed assessment for the construction of a sewer, which is not required by statute, does not constitute constructive notice to the property owners, and cannot have a binding effect on them, or estop them from subsequently objecting to the proceedings. *Monk v. Ballard*..... 35

10. SAME—PUBLICATION OF ORDINANCE. The publication of an ordinance, as by statute required, that the city was about to create an assessment district for the construction of a sewer, is constructive notice to the owners of contiguous property sufficient to put them upon inquiry as to the fact of an assessment of their property therefor. *Id*..... 35

11. MUNICIPAL CORPORATIONS — SPECIAL ASSESSMENTS — APPEARANCE FEE OF OBJECTORS. Upon a special assessment against property benefited by the opening of a street, objectors to an assessment levied by commissioners appointed by the superior court, may be required on filing joint objections, to pay the clerk of the court an appearance fee of two dollars, but only one such fee can be demanded where the objectors appear by one attorney and unite in their objections. *State ex rel. Rock v. Case*..... 658

12. SAME—MANDAMUS TO COMPEL ASSESSMENT. Mandamus to compel the city to levy a local assessment is the proper remedy for the contractor to pursue where the city has made a void assessment and refuses to correct the same, since it is the only complete and adequate remedy. *State ex rel, Barber Asphalt Pav. Co. v. Seattle*. 370

13. SAME—PARTIES BOUND—CONTRACTOR. A contractor is not a party to proceedings to assess property owners for a local improvement, nor entitled to appeal from an order therein; hence he is not estopped to question the validity of the proceedings by failing to object or appeal. *Id*..... 370

MUNICIPAL CORPORATIONS—CONTINUED.

14. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—REASSESSMENTS —WHEN TO BE MADE—MANDAMUS TO COMPEL—LIMITATION OF ACTIONS. The right of a city to make a reassessment for local improvements being barred by the statute of limitations by the lapse of ten years after the first assessment is declared void, a proceeding by the holder of warrants to compel the city by mandamus to make a reassesment is barred by the lapse of the same length of time. *Frye v. Mount Vernon*..... 268

15. MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—NOTICE. Where the notice of a special assessment for local improvements limited the assessment to property within 120 feet of the improved streets, as described in the assessment roll, the city council could not, without notice, amend the roll to include all property within 180 feet of the streets. *State ex rel. Barber Asphalt Pav. Co. v. Seattle*..... 370

16. SAME—PARTIAL VALIDITY. Such an assessment is valid as to the 120 feet first described, that part not being affected by proceedings as to another part; but it is void as to the 60 feet added by amendment, since it is essential that notice be given of the intention to assess such strip at that stage of the proceedins. *Id*..... 370

17. MUNICIPAL CORPORATIONS—LOCAL ASSESSMENTS—CANCELLATION—JUDGMENT—RIGHT TO REASSESS. A judgment cancelling a void assessment is erroneous in enjoining the city from collecting anything further on account of the improvement, since it has the right to make a reassesment. *Lester v. Seattle*..... 539

18. SAME—VOID ASSESSMENT—POWER TO REASSESS. The power of the city to levy a valid assessment for a local improvement is not exhausted by the levy of a void or ineffective assessment, and in such case the right to reassess is not dependent upon a judgment of a court declaring the first assessment void. *State ex rel. Barber Asphalt Pav. Co. v. Seattle*..... 370

19. ASSESSMENT ACCORDING TO VALUATIONS—BENEFITS. A local assessment upon contiguous property to pay the cost of the construction of a sewer, levied upon all of the property in the assessment district, in proportion to the assessment of the property for general taxation, is invalid, being in violation of Const., art. 7, § 9, providing that such assessments for local improvements shall be by special assessment upon the property benefited. *Monk v. Ballard*..... 35

20. SAME—ASSESSMENT FOR SEWER—APPROXIMATE PROPERTY. In case of local assessments to pay for the construction of a sewer, property legally assessable therefor as "approximate thereto" must be so situated as to be capable of using the sewer or deriving a special advantage therefrom, different in character from that enjoyed by the general public. *Monk v. Ballard*..... 35

MUNICIPAL CORPORATIONS—CONTINUED.

21. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—SPECIAL BENEFITS—BRIDGES. The building of a bridge and opening of the same for highway purposes is a special benefit to property abutting on the approach, which may be offset against the damages from a change of grade of the street. *Spokane Traction Co. v. Granath*..... 506

22. SAME—BRIDGE BUILT BY STREET RAILWAY—OFFSET OF BENEFITS. Where a street railway company, under direction of the city, builds a bridge which is to be open to public travel, the special benefits to abutting property may be offset against the damages, as if the city had done the work exclusively for its own benefit. *Id*..... 506

23. SAME—EVIDENCE OF SPECIAL BENEFITS—HARMLESS ERROR. Upon an issue as to special benefits to be offset against the damages to abutting property, the admission of evidence improper in form is not prejudicial error when the cause was tried before the court without a jury. *Id*..... 506

24. SAME—ALLOWANCE OF DAMAGES—IMPROVEMENTS. In estimating the benefits and damages to property abutting upon an improvement, it is not error to allow damages to the owner of the fee and not allow damages to the owner of the improvements thereon. *Id*..... 506

25. CHARGING MUNICIPALITY WITH PORTION OF EXPENSE. Upon exceptions to the assessment of abutting property, for benefits from a local improvement, it is competent for the court to deduct a certain per cent of the assessment and charge the same against the general fund of the city, as a general benefit to the city from the improvement. *In re Pike Street*..... 551

26. SAME — PAYMENT OF DAMAGES — MUNICIPAL INDEBTEDNESS — LIABILITY OF CITY. Upon a proceeding by a city to condemn lands for a public street, the same to be paid by assessment upon property specially benefited, if sufficient can be raised in that way, any inquiry as to the amount of the city indebtedness is immaterial; especially where the city has taken a penal bond from interested owners, conditioned that the city will not be called upon to pay any portion of the expense. *State ex rel. Thomas v. Superior Court*..... 521

27. ACTION TO ANNUL ASSESSMENT—DILIGENCE. An action to annual a special assessment to pay the cost of the construction of a sewer is commenced within a reasonable time when it is brought by the owners of contiguous property within thirty days after the going into effect of the ordinance approving the assessment roll. *Monk v. Ballard* 35

28. POWERS—CUL DE SAC AS STREET—COURTS—LEGISLATIVE FUNCTION. The establishment by the city authorities of a *cul de sac* as a public thoroughfare, is a legislative function with which the courts will not interfere. *State ex rel. Thomas v. Superior Court*..... 521

MUNICIPAL CORPORATIONS—CONTINUED.

29. DUTY—STREETS NOT IMPROVED. It is the duty of the city to keep in ordinary repair a street which, to its knowledge, is in common use, and suffered to remain open, although not formally accepted or improved by the city *Cady v. Seattle*..... 402

30. MUNICIPAL CORPORATIONS—STREETS—CLAIM FOR DAMAGES—SUFFICIENCY—DESCRIPTIONS OF LOCATION. A notice of claim for damages sustained through a defective sidewalk sufficiently complies with the charter provision that it "accurately" locate the defect, when the place is described as on the south side of Bay street between First and Western avenues, thereby locating the same within the distance of one block, and where an examination of the location would have revealed such a defect as that described in the notice. *Mulligan v. Seattle*..... 264

31. MUNICIPAL CORPORATIONS—STREETS—DEFECTS—CONTRIBUTORY NEGLIGENCE OF TRAVELER THROWN FROM A WAGON—QUESTION FOR JURY. The question of the contributory negligence of a traveler by team, who was injured by being thrown from his wagon by the dropping of the front wheels into a hole, two feet deep, at the edge of a pavement at a street intersection, is for the jury, where there was conflicting evidence as to whether the defect was visible from the wagon and could have been avoided by ordinary care. *Cady v. Seattle*.. 402

32. SAME—SAFER ROUTE. One traveling by wagon in a city street, open for public travel, who was injured by reason of a defect in the street, is not guilty of contributory negligence by reason of the fact that there is another safer way that he might have taken to reach his destination. *Id*..... 402

33. MUNICIPAL CORPORATIONS—MAINTENANCE OF FIRE DEPARTMENT—NEGLIGENCE OF EMPLOYEES—LIABILITY. A city is not liable for damages caused by a horse used in its fire department, which was permitted to trespass upon plaintiff's lawn through the negligence of the firemen, since the maintenance of its fire department is the exercise of a governmental function (RUDKIN, FULLERTON, and DUNBAR, JJ., dissenting). *Cunningham v. Seattle*..... 134

MUTUALITY:

Of contract, see CONTRACTS, 2.
Of agreement to sell lands, see FRAUDS, STATUTE OF, 3.

NAMES:

Description of party in summons, see PROCESS, 3.

NAVIGABLE WATERS:

1. NAVIGABLE WATERS—WHAT ARE. A small lake having an average depth of sixteen feet, upon which there is operated one steamboat and numerous small pleasure boats used mostly for pleasure in the summer season, is navigable. *Kalez v. Spokane Valley Land and Water Co*..... 43

NAVIGABLE WATERS—CONTINUED.

2. SAME—RIGHTS OF STATE—IRRIGATION. The state can make any use of the water or body of a navigable lake, and confer the rights of irrigation therein. *Id.* 43

3. SAME—RIGHTS OF LITTORAL OWNERS. The erection of dams whereby the waters of a lake collected during the winter season months, are retained in the summer for the purpose of irrigation, but which does not raise the waters above the line of ordinary high water mark, does not give rise to any action for damages, where a sufficient amount of water was not withdrawn in the summer time to lower the line below the line of ordinary low water mark. *Id.* 43

4. SAME—VESTED RIGHTS AS AGAINST STATE. Littoral owners upon a navigable lake, who took title from the government prior to the admission of the state, acquire no vested rights that would interfere with the sovereignty of the state over the waters or the land below ordinary high water mark. *Id.* 43

5. NAVIGABLE WATERS—OBSTRUCTIONS—DAMS—CONSENT OF GENERAL GOVERNMENT. A meandered slough, which is dry except during high tide, when it is navigable for a short distance for small craft and floating logs, is not navigable to the extent of requiring the consent of the United States government to its obstruction by a dam across its mouth to keep tide water from a drainage district. *State ex rel. Matson v. Superior Court* 491

NAVIGATION:

See NAVIGABLE WATERS.

NEGLIGENCE:

In setting broken leg, see PHYSICIANS AND SURGEONS.
Of city in care of streets, see MUNICIPAL CORPORATIONS, 29-32.
Of contractor, release of surety, see PRINCIPAL AND SURETY.
Of passenger, see CARRIERS, 9.
Of servant, see MASTER AND SERVANT.

1. NEGLIGENCE — DESTRUCTION OF MILL BY FIRE — ORIGIN — FALL OF TROLLEY WIRE—EVIDENCE—SUFFICIENCY—NONSUIT. In an action to recover for the destruction of a mill by fire alleged to have originated from the falling of an electric trolley wire, there is no sufficient evidence as to the origin of the fire, and a nonsuit is proper, where it appears from the testimony of the plaintiff that he discovered the fire shortly after it started, and immediately crossed the railroad track where the wire was afterwards found upon the ground burning everything with which it came in contact, with a loud crackling noise, and it would have been impossible for the plaintiff to have passed the wire if it had been down at the time without having noticed it, and where the only evidence tracing the origin of the fire to the falling wire was circumstantial. *Imeson v. Tacoma R. and Power Co.* 74

NEGLIGENCE—CONTINUED.

2. NEGLIGENCE—FIRES—ADJOINING LAND OWNERS—FAILURE TO PREVENT SPREAD OF FIRE—EVIDENCE—SUFFICIENCY. Findings that an adjoining landowner was negligent in not taking proper precautions to prevent the spreading of a fire set out upon his land, rendering him liable for injury to his neighbor, under Bal. Code, § 3138, are sustained by evidence to the effect that he started the fire at the driest time of the year, and frequently left home, leaving no one to guard the fire or prevent its spreading. *Kuehn v. Dix*. 532

3. NEGLIGENCE — DANGEROUS PREMISES — ENTRANCE TO BASEMENT — FALL DOWN STAIRWAY. The owner of premises is not liable to a pedestrian on the sidewalk who falls down a stairway in attempting to escape from a runaway horse, where it appears that the stairway was in a private alley at the side of a building, protected on all sides except its entrance, which was over four feet from the line of the sidewalk and was a necessary or proper entrance to the basement of the building; since the owner is not required to guard against such an extraordinary accident. *Sheehan v. Bailey Building Co*..... 535

NEW TRIAL:

Affidavits, how brought up, see APPEAL AND ERROR, 13.
Motions, as evidence, see EVIDENCE, 3.
Motion extending time for appeal, see APPEAL AND ERROR, 7.

1. APPEAL—REVIEW—GRANT OF NEW TRIAL. Where a motion was made for a new trial upon several grounds, it not appearing upon which of them the ruling of the court was based, the action of the court in granting a new trial should not be disturbed on appeal if it can be sustained, or was within the discretion of the court, upon any of the grounds stated. *Colvin v. Northern Pac. R. Co*..... 5

2. NEW TRIAL—JURORS—MISCONDUCT—SUFFICIENCY OF APPLICATION. A new trial on the ground of misconduct of the jury, in that they were influenced to render a verdict of guilty from the fact that there had been an attempt to bribe a number of the jurymen, is properly denied where affidavits in support of the motion contained only hearsay statements as to the fact that the attempt at bribery was communicated to the jury before arriving at their verdict, and where no affidavits of the jurymen were produced, and no excuse given except that defendants' counsel have been unable to find any juror who was willing to make affidavits. *State v. Wilson*..... 56

3. SAME—ATTEMPT AT BRIBING JURY—DISCLAIMER. A motion for a new trial on the ground that an attempt had been made to bribe a juror in the interests of the moving party is properly denied where the moving party does not show by affidavit that he had no knowledge or connection with the attempt at bribery. *Id*..... 56

4. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—BAD FAITH ON EXECUTION OF CONTRACT. In an action upon contract to recover a sum de-

NEW TRIAL—CONTINUED.

posited by the vendees as a forfeit, on the failure to purchase mining property sold by the plaintiff, in which there was a finding in favor of the plaintiff, it is proper to deny a new trial on the ground of newly discovered evidence of bad faith in that the appellant first ascertained at the trial that his co-vendee was paid a commission on the sale, where there is no clear showing that the vendor sought to gain any advantage thereby or that the property was worth less than the purchase price, or that a different result would be probable on a new trial. *Pierson v. Peirce*..... 164

NONRESIDENCE:

Foreign guardian, leave to sue, see GUARDIAN AND WARD, 1.
Nonresident testator, necessity of administration, see EXECUTOR AND ADMINISTRATORS, 1.
Right of nonresident to adopt child, see ADOPTION, 1, 2.

NONSUIT:

Before trial, see DISMISSAL AND NONSUIT.

NOTICE:

Condemnation proceedings, see EMINENT DOMAIN, 10-13.
Of action or process, see PROCESS.
Of appeal, see APPEAL AND ERROR, 7-10
Of claims against city, sufficiency, see MUNICIPAL CORPORATIONS, 30.
Of equity of deceased wife, see VENDOR AND PURCHASER, 4-6.
Of forfeiture of lease of tide lands, see PUBLIC LANDS, 4-6.
Of pledge of stock, see PLEDGES, 1.
Of settlement or filing statement of facts, see APPEAL AND ERROR, 10
Proposed public improvement, see MUNICIPAL CORPORATIONS, 9, 10, 15.
Record of mortgage as notice, see CHATTEL MORTGAGES.

NUISANCE:

Obstruction of navigable waters, see NAVIGABLE WATERS.

OBJECTIONS:

Necessity for purpose of review, see APPEAL AND ERROR 3.
To assesment for public improvements, see MUNICIPAL CORPORATIONS, 9, 11.
To evidence, see EVIDENCE, 2.
To premature commencement of action, when to be made, see ACTIONS, 1.

OBSTRUCTIONS:

Of navigable waters, see NAVIGABLE WATERS, 3, 5.

OFFICERS:

Liability for negligence in performing governmental functions, see MUNICIPAL CORPORATIONS, 33.
Mandamus affecting, see MANDAMUS, 1.

OFFICERS—CONTINUED.

Of irrigation district, see DRAINS.
State land commissioner, see PUBLIC LANDS, 4.
State officers, authority to contract, see STATES, 1, 2.

OPINIONS:

Representations on sale, see VENDOR AND PURCHASER, 7.

OPTION:

To purchase lands, see VENDOR AND PURCHASER, 10-11.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

ORDERS:

Review, see APPEAL AND ERROR.

PARAMOUNT TITLE:

Litigation of in foreclosure, see MORTGAGES, 2.

PARENT AND CHILD:

See ADOPTION.

PAROL AGREEMENTS:

Modifying written contract, see CONTRACTS, 5, 6.

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PARTIES:

See QUO WARRANTO, 1.
Description in summons, see PROCESS, 3.
Intervention of counsel to obtain fees, see DIVORCE, 2.
Misconduct of in bribing a juror, see NEW TRIAL, 3.
Persons entitled to raise constitutional questions, see CONSTITUTIONAL LAW, 1.
To appeal, see APPEAL AND ERROR, 10.
To assessment proceedings, see MUNICIPAL CORPORATIONS, 13.

1. PARTIES—ACTION ON JOINT BOND—NECESSARY PARTIES PLAINTIFF. Where the interests of two obligees, named in a statutory bond, are several and not joint, or if the separate property of only one is affected, such party may maintain an action alone, to recover his damages sustained, without joining his co-obligee. *Harrington v. Gordon*..... 692

PARTNERSHIP:

1. PARTNERSHIP — NOTE OF SUCCESSOR FOR FIRM DEBT — PAYMENT. The acceptance by a creditor of a firm of the individual note of one of the partners, after a dissolution, will not operate as a payment of the pre-existing debt, or discharge the other partner, where it was not agreed or intended to have that effect. *Moon Brothers Carriage Co. v. Devenish*..... 415

PART PERFORMANCE:

See FRAUDS, STATUTE OF, 1.

PAYMENT:

See ACCORD AND SATISFACTION.
By note after distribution, see PARTNERSHIP, 1.
Of notes in grain, see PRINCIPAL AND AGENT, 2.

PERSONAL INJURIES:

See NEGLIGENCE, 3.
To employee, see MASTER AND SERVANT.
To passenger, see CARRIERS, 9.

PHYSICIANS AND SURGEONS:

Malpractice, see DAMAGES, 10.
Medical attendance, see DAMAGES, 3, 4.
Privileged communications, see WITNESSES, 2, 3.
Report of, as best evidence, see INSURANCE, 4.

1. MALPRACTICE—EVIDENCE OF NEGLECT OF PHYSICIANS—SUFFICIENCY. A verdict in favor of the plaintiff, in an action for malpractice, will not be disturbed on appeal as unsupported by the evidence, where there was much conflict in the testimony as to the correctness of the remedies and methods in attempting to set a compound fracture of the leg, and where it appeared that the wound did not heal, but was, in a short time, in very bad condition, necessitating amputation of the foot. *Froman v. Ayars*..... 385

PLATS:

Of streets across tide lands, see PUBLIC LANDS, 1-3.

PLEADING:

See INTERPLEADER, 1; QUO WARRANTO, 1.
Answer in condemnation, see EMINENT DOMAIN, 14, 15, 21.
Cross-complaint, see MORTGAGES, 4.
For fraud or mistake, see SALES, 2.
For personal injuries to servants, see MASTER AND SERVANT, 4.
For possession of demised premises, see LANDLORD AND TENANT, 1, 4.
In action for subscription, see SUBSCRIPTION, 1.
Issues, proof and variance, see REPLEVIN, 1.
On bond, see BONDS, 1.
Pleas in criminal prosecutions, see CRIMINAL LAW, 1-5.
Recovery of interest beyond date of complaint, see INTEREST, 1.

1. PLEADING—DEMURRER. A general demurrer does not raise the question of improper joinder of causes of action since Bal. Code, § 4977, makes improper joinder a special ground of demurrer. *Ames v. Kinnear*..... 80

2. PLEADING—COMPLAINT—DEMURRER. Where a complaint states a good cause of action, objection upon demurrer that it is not sufficiently specific is not available. *Wiest v. Coal Creek R. Co*.... 176

PLEADING—CONTINUED.

3. PLEADINGS — DEMURRER — AMENDMENTS. Upon sustaining a demurrer to a petition and granting leave to amend, the court is not thereby precluded from overruling a demurrer to an amended petition stating substantially the same facts with some additional averments. *Murphy v. Murphy*..... 142

4. PLEADING—APPOINTMENT OF RECEIVER—OBJECTION TO GENERAL ALLEGATIONS. In an action by a receiver, an objection that the allegations of the complaint as to the appointment of a receiver are not sufficiently specific cannot be raised by demurrer. *Allen v. Baxter*..... 434

5. PLEADINGS—AMENDMENTS—DISCRETION. It is discretionary to permit a trial amendment of the answer, and no abuse of discretion appears where application was made several days before the trial, and no request for a continuance was made. *Shine v. Culver*.. 484

6. PLEADING—ESTOPPEL—INCONSISTENT POSITIONS After interposing a demurrer on the ground that a certain party was a necessary party plaintiff, the defendants, after such party has been brought in as a party plaintiff, are estopped to claim the original complaint fails to state any cause of action as to such party. *Harrington v. Gordon*..... 692

7. PLEADINGS—SETTLEMENT OF—WAIVER OF ERROR BY GOING TO TRIAL. Error in striking out part of an answer and sustaining a demurrer thereto is not waived where the appellant did not plead over, but went to trial as the pleadings stood. *Federal Iron and Brass Bed Co. v. Hock* 668

8. PLEADING—TRIAL—MOTION FOR JUDGMENT ON PLEADINGS—ADMISSIONS. Where defendant moves for judgment on the pleadings, and the plaintiff makes no application to amend, the motion has the effect of admitting all the allegations of the complaint and the reply considered together, notwithstanding the denials of the answer; and if no cause of action is stated, a trial of the issues raised by the denials of the answer is unnecessary. *Fishburne v. Merchants Bank of Port Townsend* 473

PLEDGES:

1. PLEDGE — STOCK IN CORPORATIONS — WHETHER RELEASED BY REORGANIZATION—CONSENT OF PLEDGEE—NOTICE. Where all the interests of a stockholder in a corporation, stock issued as well as stock to be thereafter issued, was pledged by him as security for a debt, and a reorganization of the corporation is effected whereby each of the stockholders is to receive a corresponding interest in a new corporation, the pledge cannot be released without the consent of the pledgee; and where the pledgee refused to release any of the debtor's interest (save certain shares), and certain shares in the new corporation are at the direction of the debtor, issued and pledged to

PLEDGES—CONTINUED.

the pledgee as security for a new note representing the same indebtedness, the pledge as to such shares is a continuous one, and is not affected by an attempted prior assignment by the debtor of a portion of such shares to another who had notice of the lien of the pledgee. *Dexter Horton & Co. v. McCafferty*..... 221

PLUMBERS:

License of, see CONSTITUTIONAL LAW, 4.

POSSESSION:

Of mortgaged property, see CHATTEL MORTGAGES, 2; MORTGAGES, 3, 6-8.

Of real property of estate, see EXECUTORS AND ADMINISTRATORS, 3, 4.

Of stolen cattle, see CRIMINAL LAW, 25.

PRACTICE:

See APPEAL AND ERROR, APPEARANCE; CERTIORARI, 1; CONTINUANCE; CRIMINAL LAW; DISMISSAL AND NONSUIT; DIVORCE; LIMITATION OF ACTIONS; NEW TRIAL; PARTIES; PLEADING; PROCESS; TRIAL.

Prosecution of actions in general, see ACTION, 2, 3.

PRESCRIPTION:

Use of waters, *res adjudicata*, see JUDGMENT, 1.

PRESUMPTIONS:

As to ancient deed, see DEEDS, 1, 2.

Of innocence, see CRIMINAL LAW, 22.

PRINCIPAL AND AGENT:

See BROKERS.

Authority to issue bill of lading, see CARRIERS, 4, 5.

Conveyance by agent, see QUIETING TITLE, 1.

1. PRINCIPAL AND AGENT—TRAVELING SALESMAN—NOTICE—AUTHORITY AS TO COLLECTIONS. Notice to a traveling salesman, the agent of a creditor, that a partnership had been dissolved, and that one of the partners had assumed payment of the firm debts, is not proof of notice to his principal, in the absence of evidence showing that he had authority over the collection of the account due his principal from the firm; since the scope of the authority of a traveling salesman does not extend to collections. *Moon Brothers Carriage Co. v. Devenish*..... 415

2. PRINCIPAL AND AGENT—AGENCY—UNDISCLOSED PRINCIPAL—BILLS AND NOTES—AUTHORITY TO ACCEPT PAYMENT IN GRAIN. Where a note and mortgage is made to an agent of a nonresident loan company holding a general power of attorney, without disclosing his principal, and it is agreed that the payments may be made in grain, and pay-

PRINCIPAL AND AGENT—CONTINUED.

ments were so made for ten years, it must be held that the agent represents and is acting for the mortgagee in receiving payments in grain, and had authority so to do. *Dusenberry v. McDole*..... 470

PRINCIPAL AND SURETY:

See BONDS; INDEMNITY.

1. PRINCIPAL AND SURETY—INDEMNITY—RELEASE BY PAYMENT TO CONTRACTOR PENDING SUIT—CONTRACTS—CONSTRUCTION. The making by a city of final payment to a contractor upon public work, two months after an action has been commenced against the city to recover for personal injuries sustained through the negligence of the contractor in failing to guard an excavation in the street, and the failure of the city to retain sufficient money to reimburse the city on account of such action, will not have the effect of releasing the surety upon the indemnity bond of the contractor guaranteeing the performance of his contract and saving the city harmless from such a judgment, where the city was not required by the contract to withhold any fixed sum, but the contract simply provided that the city could withhold such sum as the board of public works deemed necessary, and where there is no proof of fraud or collusion on the part of such board. *Spokane v. Costello*..... 182

PRIORITIES:

Of mortgages, see MORTGAGES, 2, 3.

PRIVILEGED COMMUNICATIONS:

Disclosure by witness, see WITNESSES, 2, 3

PROCESS:

See MANDAMUS.
Effect of appearance, see APPEARANCE.
Foreclosure of mortgage against infants, see INFANTS, 1.
Notice to owners, see EMINENT DOMAIN, 11-13

1. PROCESS—SUMMONS—SUFFICIENCY OF AFFIDAVIT FOR PUBLICATION. An affidavit for a summons for publication is sufficient although it states conclusions of private facts. *Mosley v. Donnell*..... 518
2. PROCESS — SERVICE ON FOREIGN CORPORATIONS — VENUE — JURISDICTION OF SUBJECT-MATTER. Under Bal. Code, § 4854, the superior court has no jurisdiction of the subject-matter of an action against a foreign corporation commenced in a county wherein the company has no agent, by service upon a statutory agent in another county. *Hammel v. Fidelity Mutual Aid Association*..... 448
3. PROCESS—DESCRIPTION OF PARTY—CHRISTIAN NAME. Service of a summons and complaint upon a minor heir, described as an infant daughter without specifying her Christian name, is valid when it appears from the record that she was the only daughter to whom the summons could refer and the service was properly made upon her. *Gravelle v. Canadian and American Mortgage etc. Co*.... 457

PROPERTY:

Assessable for local improvement, see MUNICIPAL CORPORATIONS, 20.
Includes chose in action, see GUARDIAN AND WARD, 2.
Taking or damaging for public use, see EMINENT DOMAIN.

PROSTITUTION:

Instructions, see CRIMINAL LAW, 26.
Title of act, see STATUTES, 1.

PROXIMATE CAUSE:

Of injury, see NEGLIGENCE, 1.

PUBLICATION:

Service of process, see PROCESS, 1.

PUBLIC IMPROVEMENTS:

For establishment of drains, see DRAINS, 1-6.

PUBLIC LANDS:

Lease of, reinstatement, see MANDAMUS, 1.

1. PUBLIC LANDS—HIGHWAYS ACROSS TIDE LANDS—LEGISLATURE—POWER TO VACATE STREETS. The legislature has the power to vacate streets platted across the tide lands the fee of which was still in the state, where no private rights had intervened; and the approval of a plat made by the tide land commissioner which conflicts with former plats by upland owners necessarily vacates the former plat and all streets in conflict with the latter plat. *Henry v. Seattle*. 420

2. SAME—CANCELLATION OF CONTRACTS—STREET PROJECTIONS. Laws 1897, p. 30, authorizing the vacation of tide land contracts covering legally established street projections has no application to a contract made subsequently to the legal vacation of such streets. *Id*..... 420

3. SAME—ESTOPPEL TO QUESTION VACATED PLAT. The purchaser of tide lands according to the latest plat thereof legally existing at the time of the purchase is not estopped to dispute a former plat of the same lands which was vacated by the approval of the latter plat. *Henry v. Seattle*..... 420

4. PUBLIC LANDS—LEASE—FORFEITURE—NOTICE BY MAIL—STATUTES—CONSTRUCTION. Under Bal. Code, § 2155, requiring the commissioner of public lands to cause notice to be served on the lessees of public lands who may become delinquent within sixty days, and if no response be had, to declare a forfeiture of the lease, notice may be given by mail, in view of the burden and impracticability of personal service on all state lessees, and of the settled practice of the office to make service by mail. *State ex rel Smith v. Ross*..... 439

PUBLIC LANDS—CONTINUED.

5. SAME—FAILURE OF NOTICE—CANCELLATION OF LEASE. Where the notice of delinquency mailed by the state land commissioner to a lessee of state lands fails to reach the lessee and is returned unopened, the commissioner has no authority to cancel the lease for nonpayment of rent; and a lessee paying within sixty days after a second notice is entitled to a reinstatement of a lease cancelled for nonpayment of rent. *Id*..... 439

6. STATE LAND COMMISSIONER—CANCELLATION OF TIDE LAND LEASE—INJUNCTION—ADEQUATE REMEDY BY APPEAL. An appeal by a lessee lies to the superior court from an order of the state board of land commissioners, cancelling a state lease of tide lands, under Laws 1901, p. 98, giving such right to an "applicant" for a lease, or to any person deeming himself aggrieved by any order affecting his rights or interests in such lease; and there being an adequate remedy at law, a court of equity will not grant such relief by an injunction. *Seattle Wharf Co. v. Callvert*..... 390

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

QUESTIONS FOR JURY:

In civil actions, see MASTER AND SERVANT, 2, 3, 6, 10, 13; MUNICIPAL CORPORATIONS, 31, 32; TRIAL, 2.

QUIETING TITLE:

Judgment on reversal, see APPEAL AND ERROR, 20.

1. QUIETING TITLE—EVIDENCE OF TITLE—SUFFICIENCY. As against title by patent from the government, and regularly executed mesne conveyances, oral evidence of a conveyance from one, as agent, who never had record title, and denied by the agent, is insufficient to establish title. *Turner v. Ladd*..... 274

QUO WARRANTO:

1. QUO WARRANTO—TO CORPORATIONS—JURISDICTION—PARTIES—PRIVATE CITIZENS AS RELATORS—INTEREST. The courts have no jurisdiction of a proceeding in the nature of a *quo warranto* to enjoin the wrongful acts of corporations, prosecuted on the relation of private citizens, on the refusal of the prosecuting attorney to institute such proceeding on his own relation, where it is not alleged that the relators claim any interest in the office, franchise or corporation which is the subject of the information, as required by Bal. Code, § 703, their remedy being by motion to compel the prosecuting attorney to act, and by appeal from an order thereon. *State ex rel. White v. Point Roberts Reef Fish Co*..... 409

RAILROADS:

As employers, negligence, see MASTER AND SERVANT, 4, 5.
Appropriation of property, see EMINENT DOMAIN, 9, 14, 18.
Carriage of goods and passengers, see CARRIERS.
Defective brakes, see MASTER AND SERVANT, 4.

1. RAILROADS—LABORERS' LIENS UPON RAILROAD CONSTRUCTION—PROVISO FOR CONTRACTOR'S BONDS—LIABILITY OF RAILROAD ON FAILURE TO TAKE BOND—STATUTORY CONSTRUCTION. By the act of 1893, p. 32 § 1 (Bal. Code, § 5900), entitled an act providing for the enforcement of liens, without any mention of the provision relating to bonds of contractors, which provides for liens for labor upon specified classes of property, with a proviso to the effect that railroad companies letting work to contractors shall take a bond for the protection of laborers and materialmen, and in case of failure so to do, the company shall be liable to the full extent of such debts contracted by such contractor, construing all the provisions of the act together, the proviso was intended as an exception to the body of the act, whereby the railroad could relieve its property from such liens by the filing of the bond, and it was not intended as an accumulative remedy against the company; hence the effect of failure to file the bond, is to render the railroad property lienable and the company liable over for a deficiency upon perfecting the lien; and the railroad company is not liable to labor claimants unless the liens are perfected. *Laidlaw v. Portland etc. R. Co*..... 292

RATIFICATION:

Of act of agent, see PRINCIPAL AND AGENT, 2.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

See ADVERSE POSSESSION; MORTGAGES; PUBLIC LANDS.
Evidence of character of property, see HUSBAND AND WIFE, 3.
Of estate, right to possession, see EXECUTORS AND ADMINISTRATORS, 3, 4.

RECEIVERS:

Action to recover assets of corporation, see CORPORATIONS, 2.
Appointment, demurrer, see PLEADING, 4.
Review of appointment on appeal from judgment, see APPEAL AND ERROR, 2.

1. RECEIVERS—APPOINTMENT—TRUSTS—UNFAITHFULNESS OF TRUSTEE—SOLVENCY OF DEFENDANT. Where the stock in trade of a corporation, which is to cease as a going concern, is sold to one of the two stockholders, who agreed to collect the outstanding accounts, deposit the proceeds in bank and make weekly statements to the other stock-

RECEIVERS—CONTINUED.

holder, the proceeds to be divided equally after paying a balance due from the purchaser, such purchaser is a trustee, and not a partner as to such collections, and upon unfaithfulness to the trust by making false statements of collections made and refusing to account, the court is justified in appointing a receiver to take charge of the collections, when the books and information are in the exclusive possession of the trustee; and it is immaterial that the trustee is solvent or offers to give bond for the performance of any judgment. *Bauer v. Haggerty*..... 313

2. RECEIVERS—ACTIONS—LEAVE OF COURT. In an action by a receiver it is not necessary to allege leave of court to bring the action. *Allen v. Baxter*..... 434

RECITALS:

In deeds as to heirship, see DEEDS, 1, 2.

RECORDS:

Necessity of recording, see CHATTEL MORTGAGES, 1.
Of equitable interest, see VENDOR AND PURCHASER, 4, 5.
On appeal, see APPEAL AND ERROR; CRIMINAL LAW.

REDEMPTION:

From mortgage, see MORTGAGES, 3, 6-8.

REFORMATION:

Of absolute deed, see MORTGAGES, 5.

REGISTRATION:

For election to submit charter amendments, see MUNICIPAL CORPORATIONS, 1.

RELIGIOUS SOCIETIES:

1. RELIGIOUS SOCIETIES—FRAUDULENT EXPULSION—DIVERSION OF PROPERTY—COURTS—JURISDICTION—PARTIES—CAPACITY TO SUE. The courts have jurisdiction of an action brought by persons claiming to be members of a church, who allege a wrongful and fraudulent attempt to expel them from the society, and a fraudulent diversion of the church property to uses foreign to the purposes of the church, and it is error to dismiss the action for want of capacity to sue upon its appearing that the records of the church show the plaintiffs to have been expelled; since no ecclesiastical question is involved, and equity will protect from a fraudulent or void expulsion, or wrongful diversion of the property. *Hendryx v. People's United Church*..... 336

REMOVAL:

Of administrator, see EXECUTORS AND ADMINISTRATORS, 2.
Of property of foreign ward, see GUARDIAN AND WARD, 1.

REPLEVIN:

1. REPLEVIN—TITLE—EVIDENCE—ADMISSIBILITY. In an action of replevin in which the plaintiffs claim title through one R., evidence that the title of R. was fraudulent is competent under a denial that R. was the owner. *Shine v. Culver*..... 484

2. SAME—ORAL EVIDENCE OF CONTENTS OF DEED—REFUSAL TO PRODUCE INSTRUMENT. In replevin for certain tools, claimed by the defendants to have been sold to them by the plaintiffs and to have been mentioned in a quitclaim deed of the quarry, oral evidence on the part of the defendants as to the contents of such deed is admissible where the plaintiffs had obtained possession of the deed, which was not recorded, and plaintiffs failed to produce it at the trial after being requested to do so. *Id*..... 484

RESCISSION:

Of contract for sale of land, see VENDOR AND PURCHASER, 7.
On breach of contract, see CONTRACTS, 7.

RES JUDICATA:

See JUDGMENT, 1-3.

REVIEW:

See APPEAL AND ERROR; CERTIORARI.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 9-11.

ROADS:

Streets in cities, see MUNICIPAL CORPORATIONS, 6-10, 26, 28, 32.

SALES:

After payment of judgment, see EXECUTION, 1.
Contract for, mutuality, see CONTRACTS, 2.
Of corporate stock, see CORPORATIONS, 1.
Of mining property, breach of contract, see CONTRACTS, 7.
Of realty, see VENDOR AND PURCHASER.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 1.

1. SALES — SALE OF HOPS — MISTAKE OR FRAUD — EVIDENCE — SUFFICIENCY. In an action on a contract for the sale of hops to be grown by the defendant on two certain tracts of land containing ten and twenty acres respectively, the evidence sufficiently shows that the defendant signed the contract through the mistake or fraud of the plaintiffs in drawing up the contract, and that he was not liable thereunder, where it appears that the defendant, to the knowledge of the plaintiffs, had already sold the hops on the twenty-acre tract at the same price and to another firm of buyers, that the contract was an involved one, and that the defendant had confidence in the agent of the plaintiffs, and asked if the contract contained the terms

SALES—CONTINUED.

of the agreement, which in fact was confined to the ten-acre tract, and that he was informed by the agent that it did, and that he signed the contract without reading it, relying upon such representations. *Lilinthal v. Herren*..... 209

2. FRAUD—CONTRACTS—PLEADINGS—SPECIFIC STATEMENT OF FACTS. In an action upon a written contract for the sale of hops, an answer alleging that the plaintiffs, by mistake or with intent to deceive defendant, inserted an erroneous description in the contract and induced the defendant to sign the same, representing that it contained the agreement of the parties, is a sufficiently specific allegation of the facts constituting fraud, and is a valid defense to the action. *Id*..... 209

SEPARATION:

See HUSBAND AND WIFE, 1.

SERVICE:

Contract for, computation of amount due, see CONTRACTS, 8.
Evidence of value, see DAMAGES, 1.

SET-OFF AND COUNTERCLAIM.

Against administrator, see EXECUTORS AND ADMINISTRATORS, 5, 6.

SETTLEMENT:

See ACCORD AND SATISFACTION.
As ground for dismissal of appeal, see APPEAL AND ERROR, 12.
Evidence of, admissibility, see DAMAGES, 2.

SEWERS:

See DRAINS.
Construction of, see MUNICIPAL CORPORATIONS, 9, 10, 27.

SPECIFIC PERFORMANCE:

See VENDOR AND PURCHASER, 10-13.
Of oral agreement, see FRAUDS, STATUTE OF, 2, 3.

STATE LANDS:

See PUBLIC LANDS.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 12-14

STATE OFFICERS:

State land commissioner, duties, see PUBLIC LANDS.
Mandamus to commissioner of public lands, see MANDAMUS, 1.

STATES:

Legislative power, delegation of, see CONSTITUTIONAL LAW, 5.
Sovereignty over shore lands, see WATERS, 4.

1. STATES—CONTRACTS—AUTHORITY OF ATTORNEY GENERAL. Under Laws 1895, p. 58, §§ 1-3, making it unlawful for any state officer to create a deficiency or incur a liability in any sum greater than is appropriated, and Laws 1901, p. 122, limiting the amount of the attorney general's expenses in defending suits against the state, the attorney general has no authority to employ an architect as an expert necessary to the defense of an action creating a liability in excess of such limit. *Ritchie v. State*..... 653
2. SAME—IMPLIED POWER TO CONTRACT. Laws 1895, p. 188, making it the duty of the attorney general to appear and defend all suits brought against the state, does not give him implied authority to employ an expert to assist him, when the public interests require it. *Id*..... 653

STATUTES:

See DRAINS; MANDAMUS, 1.
For removal of property of foreign ward, see GUARDIAN AND WARD, 1.
Implied repeal, see EXECUTORS AND ADMINISTRATORS, 3.
Laborer's liens, see RAILROADS, 1.
Laws interfering with liberty to contract, see CONSTITUTIONAL LAW, 3, 4.
Notice of forfeiture, see PUBLIC LANDS, 4-6.
Of limitation, see LIMITATION OF ACTIONS, 1.
Statute of frauds, see FRAUDS, STATUTE OF.

1. STATUTES—TITLE—SUFFICIENCY—CRIMINAL LAW—LIVING WITH A PROSTITUTE. The title to chapter 123 of the Laws of 1903, p. 230, with reference to living off the earnings of prostitutes, etc., fails to make any mention of anything relating to male persons who live with a prostitute, and is not sufficiently broad to cover a provision making such an act a misdemeanor, but such fact does not affect the balance of the act. *State v. Poole*..... 192
2. STATUTES—TITLE—AMENDMENT. Laws 1905, p. 360, entitled an act amending §§ 3, 9 and 24, of the drainage act entitled, etc., is unconstitutional as to the clause amending § 5 of the drainage act not mentioned in the title; but the same does not affect the amendments of §§ 3, 9 and 24, as they are independent of § 5, which relates only to the bond of the ditch commissioners. *State ex rel. Matson v. Superior Court*..... 491
3. TAXATION — OF INHERITANCES — STATUTES — TITLE — SUFFICIENCY. The title of Laws 1901, p. 67, which is confined to the taxation of "inheritances," is sufficiently broad to include a tax on the right of succession by will as well as by operation of law; since inheritance is commonly so employed in this connection. *In re White's Estate*. 360

STIPULATIONS:

For dismissal of suit, see ACTIONS, 2.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 1.

STREET RAILROADS:

Appropriation of property, see EJECTMENT, 3-8.
Carriage of passengers, see CARRIERS, 10.
Liability to servants for negligence, see MASTER AND SERVANT, 7-9.

STREETS:

See MUNICIPAL CORPORATIONS, 6-10, 26, 28-32.
Across tide lands, see PUBLIC LANDS, 1-3.
Condemnation for, damages, see EMINENT DOMAIN, 1, 2, 19-21.

STOCK:

Of corporation, see PLEDGES, 1.

SUBSCRIPTIONS:

1. SUBSCRIPTION—ACTION TO ENFORCE—FAILURE OF CONSIDERATION—PLEADING—ANSWER—SUFFICIENCY. In an action to enforce the terms of a subsidy agreement, termed a "deed," for the conveyance of a half interest in certain tide lands, to be acquired from the state, which agreement shows on its face that it was received as full payment for a subsidy subscription, the full terms of which do not appear, the defendants have a right to show the terms of the subscription and a failure of consideration therefor; and the answer states a complete defense, and it is error to sustain a demurrer thereto, where it is alleged that the agreement was made in sole consideration of an agreement of the grantee to construct a certain ship canal, represented by the grantee to be of great value to the owners, and that, although seven years had elapsed, no part of the canal had been constructed, and no consideration had been received by the defendants for the subsidy agreement. *Ames v. Kinnear*. 80

SUBLETTING:

See LANDLORD AND TENANT, 2.

SURETYSHIP:

See PRINCIPAL AND SURETY.

SURRENDER:

Of bond for deed, evidence, see VENDOR AND PURCHASER, 8.

SURVEYS:

See BOUNDARIES, 1.

STATES:

Legislative power, delegation of, see CONSTITUTIONAL LAW, 5.
Sovereignty over shore lands, see WATERS, 4.

1. STATES—CONTRACTS—AUTHORITY OF ATTORNEY GENERAL. Under Laws 1895, p. 58, §§ 1-3, making it unlawful for any state officer to create a deficiency or incur a liability in any sum greater than appropriated, and Laws 1901, p. 122, limiting the amount of the attorney general's expenses in defending suits against the state, attorney general has no authority to employ an architect as expert necessary to the defense of an action creating a liability excess of such limit. *Ritchie v. State*.....
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Of limitation, see LIMITATION OF ACTIONS, 1.
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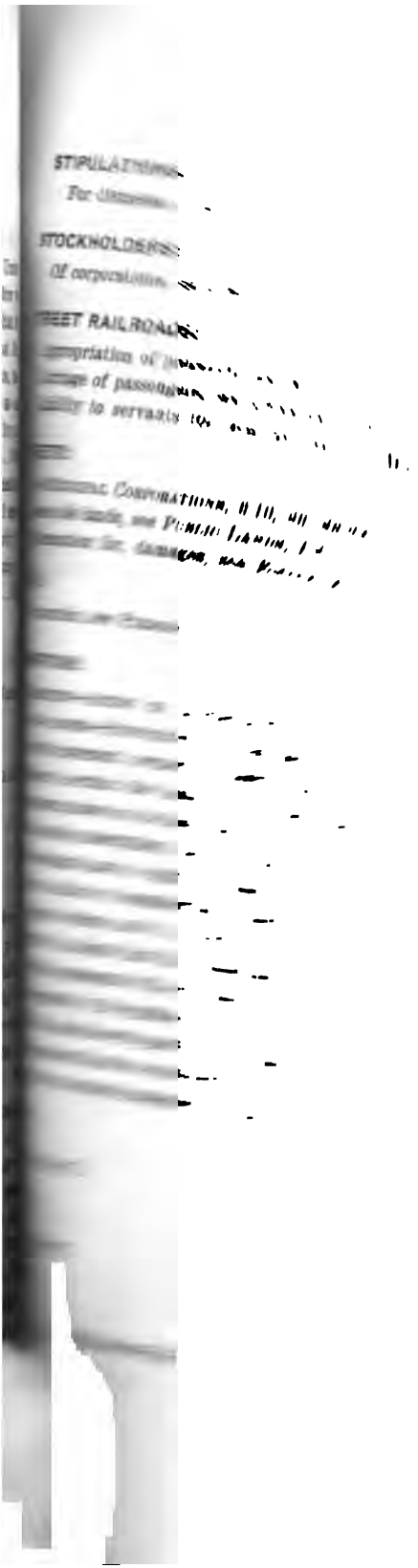

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JURY. The trial judge has
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ntiff. *Morris v. Warwick*.. 480

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TAXATION:

See DRAINS, 1-6.
Compelling city to incur expense of election, see CONSTITUTIONAL LAW, 2.
Of inheritance, see STATUTES, 3.
Payment of taxes to sustain adverse possession, see ADVERSE POSSESSION, 3.

1. TAXATION—ASSESSMENT—PERSONAL PROPERTY—LIEN—WHEN ATTACHES. Under Laws 1903, p. 73, amending the revenue laws to make the lien for personal property taxes attach upon the assessment of the same, instead of in the following year, "assessment" must be construed to refer to the listing of the property by the county assessor, in order to remedy the evils evidently aimed at by the amendment, and the lien for taxes attaches immediately upon such listing. *Klickitat Warehouse Co. v. Klickitat County*.... 299

2. TAXATION—EXCESSIVE LEVY—POWER OF COURTS TO REDUCE. Where it appears that property was assessed at over $20,000 one year, and $8,000 for subsequent years, which was about its market value, and that like property on the opposite corner of the street was assessed much lower than the property in question, the assessment is properly set aside and reduced to $8,000. *Dickson v. County of Kittitas* 429

3. TAXATION—TAX TITLE—FRAUDULENT ASSESSMENT. A tax title resting upon an assessment fraudulently procured to be made to one not the owner, when the property had been already assessed and the taxes paid, is void. *Turner v. Ladd*..... 274

TENDER:

Of purchase price, see VENDOR AND PURCHASER, 9.
Under stipulation to dismiss action, see ACTIONS, 2.

THREATS:

Constituting assault, see CRIMINAL LAW, 2.

TIDE LANDS:

See PUBLIC LANDS.

TIMBER:

Damages for cutting, pleading and proof, see BONDS, 1.

TIME:

For applying for certiorari, see CERTIORARI, 1.

TITLE:

Color of title, see ADVERSE POSSESSION, 3.
Evidence of, admissibility, see REPLEVIN, 1, 2.
Removal of cloud, see QUIETING TITLE.
Statutes, see STATUTES, 1-3.
Tax titles, see TAXATION, 3.
Trial of in condemnation, see EMINENT DOMAIN, 16.
Under sale after payment of judgment, see EXECUTORS AND ADMINISTRATORS, 1.

TORTS:

See NEGLIGENCE.

TRESPASS:

In exercise of governmental function, see MUNICIPAL CORPORATIONS, 33.

TRIAL:

See NEW TRIAL.
Amendments at trial, see PLEADING, 5.
Computation of amount due, see CONTRACTS, 8.
Condemnation proceedings, assessing damages, see EMINENT DOMAIN, 15-17.
Due preparation, evidence of, see EVIDENCE, 3.
Exceptions or objections for purpose of review, see APPEAL AND ERROR, 3-6.
Excessive verdicts, see DAMAGES, 8-12.
Failure to prosecute action, see DISMISSAL AND NONSUIT, 1.
Findings, necessity, see APPEAL AND ERROR, 22.
Improper statements of counsel, exceptions, see APPEAL AND ERROR, 4.
Instructions as to continuance, see CONTINUANCE, 2.
Instructions as to contributory negligence, see MASTER AND SERVANT, 5.
Instructions in writing, see CRIMINAL LAW, 24.
Limiting argument of counsel, see CRIMINAL LAW, 18.
Misconduct of counsel when harmless, see APPEAL AND ERROR, 18.

1. TRIAL—INSTRUCTIONS—STATING ISSUES. It is not error for the court in instructing the jury to state briefly the issues which had been made up by the pleadings. *Wiest v. Coal Creek R. Co.*.... 176

2. TRIAL—VERDICT—TAKING CASE FROM JURY. The trial judge has no power to discharge the jury and render judgment for the defendant because he thought a new trial would be necessary if any other verdict was rendered, unless there is no sufficient legal testimony to sustain a verdict for the plaintiff. *Morris v. Warwick*.. 480

3. TRIAL—MISCONDUCT OF COUNSEL—PREJUDICE. In an action against a city for personal injuries, a statement to the jury by counsel for the plaintiff that any verdict against the city would be paid largely

TRIAL—CONTINUED.

by nonresident owners of real estate held for speculative purposes, will not require a reversal where the court, on objection, immediately instructed the jury to disregard the same, and where a reversal to punish counsel would be too harsh a remedy. *Cady v. Seattle*.. 402

TRUSTS:

On dissolution of corporation, see RECEIVERS, 1.

UNLAWFUL DETAINER:

See FORCIBLE ENTRY AND DETAINER; LANDLORD AND TENANT, 1.

USURY:

Mortgage securing, foreign, see CONTRACTS, 2.

1. USURY—COMPOUNDING INTEREST. A promissory note, payable in one year, drawing interest at 10 per cent per annum, and providing that if not paid when due the interest should be added to the principal and the whole sum to draw interest thereafter at 12 per cent per annum, does not violate Bal. Code, § 3669, providing that no greater sum than 12 per cent shall be taken; since simple compounding of interest is not usurious, and since, where the debtor can avoid the payment of a larger sum by the payment of a smaller sum at an earlier date, a larger sum is a mere penalty and not usury, where no subterfuge is employed compelling the payment of a larger sum of interest not allowed by statute. *Blake v. Yount*..... 101

2. USURY—NOTE OF ANOTHER STATE—MORTGAGE SECURITY IN THIS STATE. A note and mortgage executed and made payable in another state by *bona fide* residents of such state, is a contract of such state and is not usurious if valid in such state. *Bank v. Doherty*... 317

VACATION:

Of streets across tide lands, see PUBLIC LANDS, 1-3.
Order of, when reviewable, see APPEAL AND ERROR, 1.

VENDOR AND PURCHASER:

Deceit in sale of lands, see ACCOUNT, 1.
Mutuality of contract, see FRAUDS, STATUTE OF, 3.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 2, 3.

1. VENDOR AND PURCHASER—CONTRACT OF SALE—ACCEPTANCE—EVIDENCE—SUFFICIENCY. The evidence, although conflicting, is sufficient to establish that the purchaser of lands from a corporation accepted a contract of sale, where it appears that the board of directors of the corporation adopted a resolution authorizing the sale, and witnesses testified that it was accepted by the purchaser, that the notes were executed and cash procured for the payments, and that the vendor only rescinded the sale after it had received a better offer,

VENDOR AND PURCHASER—CONTINUED.

pending negotiations to perfect the title, which it had fully intended to perfect. *Western Timber Co. v. Kalama River Lumber Co.*. 620

2. VENDOR AND PURCHASER—CORPORATIONS—SALE BY OFFICER—AUTHORITY—RATIFICATION. Where the principal stockholder and president of a corporation arranges an oral sale of its lands, his acts are ratified by the adoption of resolutions by the board of directors authorizing the sale, and the acceptance of the terms by the purchaser. *Id.*..... 620

3. SAME—ACCEPTANCE BY PURCHASER. Upon the sale of lands of a corporation, authorized by resolutions of the board of directors, the fact that the purchaser asked the adoption of further resolutions, upon the advice of attorneys examining the abstract, does not show that the sale was not accepted by the purchaser, but rather the contrary. *Id.*..... 620

4. MORTGAGES—BONA FIDE PURCHASER—RECORD—NOTICE—EQUITABLE CLAIM—NOT APPEARING OF RECORD. A mortgagee is a *bona fide* purchaser for value without notice where, at the time the mortgagor acquired title to the mortgaged premises, he was a widower living on the land with minor children, the mortgage was joined in by the mortgagor's second wife, and there was nothing of record and no actual notice to show that the first wife had an equity in the land by reason of an equitable interest or title in the mortgagor prior to her death. *Attebery v. O'Neil*..... 487

5. SAME—STRANGER TO CHAIN OF TITLE. The record of a mortgage executed by one outside the chain of title is not constructive notice of any equity or claim. *Id.*..... 487

6. SAME—ACTUAL NOTICE—MINORS LIVING WITH PARENT. The fact that minor children were living on the land with their father at the time a mortgage was executed by the father would not import notice of any claim on their part. *Id.*..... 487

7. VENDOR AND PURCHASER—RESCISSION FOR FRAUD OF VENDOR—MISREPRESENTATIONS—EXPRESSIONS OF OPINION—INSPECTION BY VENDEE—NONSUIT. In an action by a vendee of a half section of farm land, to recover damages for the fraud of the vendor in misrepresenting the number of tillable acres of land, a nonsuit is properly granted upon the testimony of the plaintiff, where it appeared therefrom that he had twice inspected and driven over the land, that the vendor and his agent, who were strangers to him, had represented that there were 240 acres of land under cultivation, and twenty-five or thirty more that could be cultivated, and it did not appear that the cultivated land had ever been measured, and the purchaser received all the land shown him, although the vendor said that he thought that part of the bad land included within the fence was beyond the boundary line. *Van Horn v. O'Connor*..... 513

VENDOR AND PURCHASER—CONTINUED.

8. VENDOR AND PURCHASER—SURRENDER OF BOND FOR DEED—EVIDENCE—SUFFICIENCY. A bond for a deed of property purchased is not shown to have been cancelled and surrendered, where it appears that the statement of such a surrender was made to the attorney of a mortgagee solely in order to secure the loan, and the vendor immediately afterwards offered to return the bond to the purchaser, who had made part payments and valuable improvements, and remained in possession, and the vendor treated the same as in force, making the demand for overdue payments and taking no steps to perfect the bond. *Conner v. Clapp*..... 642

9. SAME—TENDER—AMOUNT DUE—EVIDENCE—SUFFICIENCY. The tender of $5,500 as the amount due on a bond for a deed calling for $6,500 is sufficient where it appears that in fact $5,500 was the amount to be paid as the consideration for the property. *Id*.... 642

10. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—OPTIONAL AGREEMENT. Specific performance of a bond for a deed, or optional agreement to sell land, may be decreed where adequate consideration for the bond is shown by part payments, possession and the making of permanent improvements. *Id*..... 642

11. SAME—MUTUALITY. Specific performance of a bond for a deed will not be denied the purchaser for lack of mutuality because he did not sign the bond, which was optional in form and did not compel him to take the property. *Id*..... 642

12. SAME—FORM OF DEED IN DECREEING SPECIFIC PERFORMANCE. Upon decreeing specific performance of a bond for a deed of lands subject to a mortgage, *held* that the purchaser was entitled only to a deed of special warranty against the acts of the vendors. *Id*..... 642

13. SAME—SPECIFIC PERFORMANCE—INCREASE IN VALUE OF LAND. An increase in the value of lands sold under a bond for a deed or optional sale is not a valid reason for denying a specific performance on the part of the vendor. *Id*..... 642

VENUE:

Affidavits for change of, how brought up, see APPEAL AND ERROR, 14.
In criminal cases, denial of change, see CRIMINAL LAW, 19.

VERDICT:

Computation of amount due, see CONTRACTS, 8.

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Qualifications, see MUNICIPAL CORPORATIONS, 1-3.

WAIVER:

See APPEARANCE.
By accepting premiums, see INSURANCE, 1.
Lien of mortgage, see CHATTEL MORTGAGES, 2.
Of error, see PLEADING, 7.

WARDS:

See GUARDIAN AND WARD.

WARNING ORDER:

Failure to give, injury, see MASTER AND SERVANT, 1, 2, 6.

WATERS:

See DRAINS; NAVIGABLE WATERS.
Judgment determining right of use, see JUDGMENT, 1.
Priority of rights, judgment on remand, see APPEAL AND ERROR, 24.

WITNESSES:

Absence of, as ground for continuance, see CONTINUANCE, 1, 3.
Impeachment, see CRIMINAL LAW, 14, 15.

1. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. The oral evidence of a son, to question the conditions of a bond for a deed and other writings between himself and his deceased father, is inadmissible in an action against parties defending as representatives of the deceased, and as deriving title through the executor of his last will. *Reynolds v. Reynolds*..... 107
2. WITNESSES—PHYSICIANS—PRIVILEGED—COMMUNICATIONS. A patient waives the privilege attached to the statements of his physician when he permits him to testify without objection. *Williams v. Spokane Falls & N. R. Co*..... 597
3. SAME — CROSS-EXAMINATION. Upon the cross-examination of a physician as to the disability sustained by his patient, a wide latitude is allowed on cross-examination for the purpose of discrediting his testimony, and the same will be reviewed only for abuse of discretion. *Id*..... 597
4. EVIDENCE—AFFIDAVITS OF WITNESSES—IMPEACHMENT. The affidavit of a party made in an interlocutory proceeding is not competent evidence, except for impeaching his testimony after directing his attention thereto and giving him an opportunity to explain. *Graham v. Smart*..... 205

WRITS:

SEE CERTIORARI; MANDAMUS; PROCESS; QUO WARRANTO.

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